141-510

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~382~~. 61

MICHAEL SEITZ, PLAINTIFF IN ERROR,

vs.

THE BREWERS' REFRIGERATING MACHINE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED JULY 14, 1888.

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Rec'd
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INDEX.

	Original.	Print.
Notice of appearance and requisition for summons	1	1
Summons	2	1
Marshal's return	3	2
Complaint	4	2
Answer	9	4
Reply	14	6
Minutes of trial, &c.	16	7
Judgment	17	8
Consent to substitution of R. D. Benedict as attorney for defendant	18	8
Consent to substitution of Dickerson & Dickerson as attorneys for defendant and order thereon	19	8
Order on application to vacate judgment, &c.	20	9
Judgment	22	10
Bill of exceptions	24	11
Testimony of Bette J. Eils	24	11
Plaintiff's Exhibit 1—Letter, N. Seitz's son to B. E. J. Eils, secretary, September 26, 1879	27	12
2—Letter, B. E. J. Eils, secretary, to M. Seitz, September 29, 1879	28	12
3—Letter, B. E. J. Eils, secretary, to M. Seitz, November 10, 1879	30	14
Amendments to answer	31	14
Testimony of Thomas Cook	34	16
Michael Seitz	35	16
Charles Stoll	40	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 22, 1891.

	Original.	Print.
Plaintiff's Exhibit 3—Telegram, Charles Stoll to B. E. J. Eils, January 8, 1879	43	20
4—Letter, Charles Stoll to B. E J. Eils, January 13, 1879	43	21
5—Letter, B. E. J. Eils, secretary, to Charles Stoll, January 20, 1879	44	21
6—Telegram, C. Stoll to B. E. J. Eils, January 21, 1879	46	22
7—Letter, Charles Stoll to B. E. J. Eils, January 23, 1879	46	22
8—Letter, Charles Stoll to Robert Portner, March 16, 1879	47	23
Testimony of Julius J. Suckert	48	23
Motion for verdict	51	24
Charge of Judge Wallace	51	24
Summons	52	25
Complaint	53	25
Answer	58	28
Reply	65	31
Judge's certificate to bill of exceptions	66	31
Bond	67	32
Clerk's certificate	70	33
Writ of error	71	33
Citation	73	34
Proof of service of citation	74	35

1 United States Circuit Court for the Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY
against
MICHAEL SEITZ.

Please enter my appearance as attorney for the plaintiff in the above-entitled cause and issue summons to the marshal for service upon the defendant above named.

JOHN H. V. ARNOLD,
Attorney for Plaintiff, No. 206 Broadway, N. Y. City.

Dated April 22, 1882.

To the clerk of the circuit court of the United States for the eastern district of New York.

Endorsed: Notice of appearance and requisition for summons. Filed the 22d day of April, 1882.

2 United States Circuit Court for the Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY, Plaintiff,
against
MICHAEL SEITZ, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Brook-
[L. S.] lyn, this 22d day of April, in the year one thousand eight hundred and eighty-two.

B. LINCOLN BENEDICT, *Clerk.*

JOHN H. V. ARNOLD,
Plaintiff's Attorney; Office and Post Office Address, No. 206 Broadway, N. Y. City.

Endorsed: Summons. John H. V. Arnold, plaintiff's attorney.

To the defendant within named:

3 Take notice that upon default judgment will be taken for the sum of $9{,}450\frac{00}{100}$ dollars in money, with interest from the 20th day of September, 1879, besides cost.

JOHN H. V. ARNOLD,
Plaintiff's Attorney, No. 206 Broadway, N. Y. City.

UNITED STATES OF AMERICA, *Eastern District of New York*, } *ss:*

I hereby certify that on the 25th day of April, 1882, at Brooklyn, N. Y., I personally served the within summons and complaint on the within-named defendant, Michael Seitz, by showing him the same and delivering to and leaving with him a true copy thereof.

S. R. HARLOW,
U. S. Marshal,
By JOHN RENZ, *Deputy*.

4 Circuit Court of the United States, Second Circuit, Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY
against
MICHAEL SEITZ.

The Brewers' Refrigerating Machine Company, the plaintiff and complainant herein, by John H. V. Arnold, its attorney, complaining of the defendant, Michael Seitz, shows to this court—

That on or about the 11th day of January, in the year one thousand eight hundred and seventy-nine, the said plaintiff entered into an agreement in writing to and with the defendant herein in the words and figures following, to wit:

"This agreement, made this 11th day of January, A. D. 1879, between the Brewers' Refrigerating Machine Company of Alexandria, Va., party of the first part, and Michael Seitz, of Brooklyn, N. Y., party of the second part, witnesseth:

"That the party of the first part hereby agrees and contracts to supply the party of the second part with a No. 2 size refrigerating machine, as constructed by the said party of the first part, by
5 the 15th day of March next, or as soon thereafter as possible, the machine to be delivered at the depot or wharf in Philadelphia, Penn., and to be put up and put in operation in the brewery of the said party of the second part at 258–264 Maujer street, at Brooklyn, E. D., N. Y., under the superintendence of a competent man furnished by the said party of the first part.

"The party of the second part hereby agrees and contracts to pay to the said party of the first part for said machine the sum of nine thousand four hundred and fifty dollars ($9,450.00) in manner as follows, namely: Four thousand seven hundred and twenty-five dollars ($4,725.00) on the day when the machine is put in operation at the brewery of the said party of the second part, and the balance of four thousand seven hundred and twenty-five dollars ($4,725) in three equal instalments—that is to say, one thousand five hundred and seventy-five dollars ($1,575 00) for each instalment, payable respectively in one (1), two (2), and three (3) months after the day when the machine is put in operation at the brewery of the said party of the second part, for which instalments the said party of the second part agrees and contracts to give his notes on the day last mentioned.

In witness whereof the parties have hereunto set their hands and seals in duplicate the day and year first hereinbefore mentioned.

THE BREWERS' REFRIGERATING MACHINE COMPANY. [SEAL.]
B. E. J. EILS, *Secretary.*
MICHAEL SEITZ. [SEAL.]

Witnesses:
CHARLES STOLZ.
THOS. COOK.

6 And, further complaining, this plaintiff shows that as soon after said contract was made as was possible, and in or about the month of April, 1879, it did supply and deliver the machine mentioned in and called for by said contract to the said defendant, and put the same up and put it in operation in the brewery of said defendant, who received and accepted the same, and that the plaintiff has in all respects fully complied with all the terms and conditions of said agreement therein contained to be on its part done or performed, and that on or about the 20th of September, 1879, and long prior thereto the said machine had been put in operation at the brewery of the said defendant in said agreement mentioned; that the said defendant, although often thereto requested, has not paid the sum of nine thousand four hundred and fifty dollars ($9,450.00) provided in and by said agreement by him to be paid nor any part thereof, but has wholly refused to pay the same or to give the notes therein provided to be given by him, and has refused to pay the whole or any portion of the sum aforesaid, either in the manner or at the times provided for in said agreement, or otherwise, and more than three months had elapsed before the commencement of this action from the date when the said machine was so put in operation at the brewery aforesaid; that said defendant is now justly indebted to the plaintiff in the sum of nine thousand four hundred and fifty dollars ($9,450.00) and interest thereon from the 20th day of September, 1879, for such machine.

7 And the said plaintiff further shows that said plaintiff is a corporation duly incorporated under the laws of the State of Virginia, and has its principal place of business in the State of Virginia, and is a citizen and resident of and located within said State of Virginia, and has no residence, location, or place of business within the State of New York; and that the defendant is a citizen of and resident in the State of New York.

Wherefore plaintiff demands judgment against said defendant in the said sum of nine thousand four hundred and fifty dollars ($9,450.00), with interest thereon from the 20th day of September, 1879, besides the costs of this action.

JOHN H. V. ARNOLD,
Attorney for Plaintiff, No. 206 Broadway, New York City.

SOUTHERN DISTRICT OF NEW YORK, } ss:
State, City, and County of New York, }

John H. V. Arnold, of said city, being duly sworn, says that he is attorney for the plaintiff in the foregoing complaint named; that he has read the said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that deponent's knowledge, information, and belief are derived from an inspection and possession of the original agreement in said complaint set forth
8 and of the correspondence between the parties to the said action and from letters by him received from and personal communications by him had with the officers of the plaintiff, and that the reason why this verification is made by deponent is that none of the officers of said plaintiff are now within the city of and county of New York, wherein deponent resides, nor within the State of New York or the second circuit.

J. H. V. ARNOLD.

Sworn to before me this 22d day of April, 1882.
JOS. F. ARNOLD,
Notary Public, N. Y. Co.

Endorsed: Complaint. Filed April 26, 1882.

9 Circuit Court of the United States for the Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY, Plaintiff,
against
MICHAEL SEITZ, Defendant.

The answer of the defendant to the complaint of the plaintiff herein respectfully shows to this honorable court:

I. That he admits that on or about the 11th day of January, in the year 1879, he signed and executed an instrument in writing in the words and figures substantially as in the said complaint at folios numbered 2, 3, 4, 5, and 6 contained and set forth.

II. That he denies the allegations in folios numbered 7 and 8 of the said complaint contained and alleges and avers that plaintiff failed to put in operation a refrigerating machine in the brewery of the defendant as agreed in said instrument, and that plaintiff did not cause the said refrigerating machine to be put up under the superintendence of a competent man; that the machine placed in defendant's brewery was worthless and incapable of operating to produce the results represented by plaintiff to this defendant as an inducement to enter into the aforesaid agreement; that said
10 machine has not been accepted by this defendant nor operated or attempted to be operated by defendant, his agents, employees, nor any other person acting by or under his authority, and did not pass out of the control of the plaintiff, nor has the said ma-

chine been used by him in his said brewery, because said machine was worthless and incapable of serving any useful purpose therein.

III. That defendant denies that any sum of money has become due and payable to this plaintiff by virtue of the agreement hereinbefore mentioned, and defendant also denies that the conditions of said agreement have been so fulfilled by the plaintiff as to require the giving of the notes by this defendant, as in said agreement and complaint mentioned, and denies that plaintiff has any remedy at law for the recovery of the alleged balance of four thousand seven hundred and twenty-five dollars, but that the plaintiff's remedy, if any, lies in a suit in equity for specific performance of such part of said agreement as relates to the giving of notes for equal instalments of said alleged balance.

IV. That defendant has not sufficient knowledge to form a belief as to the truth of the allegations in said bill of complaint contained at folio numbered 11, to wit, that plaintiff is a corporation duly incorporated under the laws of the State of Virginia and has its principal place of business in the State of Virginia, and is a citizen and resident of and located within said State of Virginia, and therefore denies the same.

11 And for a further and second defense the defendant alleges upon information and belief:

I. That neither at the date of said agreement nor subsequent to said date has the plaintiff had any lawful right to make, use, or sell to others to be used the refrigerating machine named and referred to in the agreement aforesaid, and could not vest in the defendant any lawful right to use the said machine, inasmuch as the said machines embraced and included inventions and combinations of parts patented to parties other than the said plaintiff, and in which plaintiff had not at that time nor has since had any right, title, or interest whatsoever, all of which was fraudulently concealed from this defendant by said plaintiff, although the same was well known to said plaintiff at the time said agreement was made.

II. That the object of said agreement on the part of said plaintiff was to enable said plaintiff to derive profit from the putting in use and operation, contrary to law, inventions and combinations covered and embraced by letters patent of the United States owned by and belonging to parties and persons other than said plaintiff, and in which plaintiff had and has no right, title, and interest whatsoever, and to infringe upon letters patent and to cause defendant to join in such unlawful use or operation and infringement. Wherefore defendant alleges and avers that said agreement was contrary to public policy, unlawful, and void *ab initio*.

III. And defendant further alleges that had he accepted and put in operation the refrigerating machine referred to in said agree-

12 ment he would have been liable to prosecution and to heavy charges and damages because of infringement upon letters patent of the United States as aforesaid, all of which, although well known to the said plaintiff, was fraudulently concealed from this defendant by said plaintiff.

And the said defendant, answering by way of counter-claim, says—

That he, the said defendant, deceived by the false and fraudulent representations to him made by or on behalf of said plaintiff, permitted said plaintiff to erect a certain machine in the brewery of said defendant at numbers 258 to 264 Maujer street, in Brooklyn, E. D., New York, and, relying upon the false and fraudulent representations to him, the said defendant, made by or on behalf of said plaintiff, and which were known to said plaintiff to be false, he, the said defendant, did permit an agent of said plaintiff to subject his said brewery to the action of said machine, and that by the operation and action of said machine while under the supervision and control of an agent of said plaintiff a large quantity of beer in the process of manufacture in said brewery was spoiled, and thereby caused to this defendant a loss, which, together with the loss of customers directly traceable to the spoiling of said beer as aforesaid, amounts to the just and full sum of ten thousand ($10,000) dollars.

Wherefore defendant demands judgment in his favor and against this plaintiff dismissing the complaint herein, and for the sum of ten thousand ($10,000) dollars, besides the costs and disbursements of this action.

13 JAMES A. WHITNEY,
Attorney for Defendant, 140 *Nassau Street, N. Y. City.*

UNITED STATES OF AMERICA, }
City of Brooklyn, Kings County, and State of New York, } *ss:*

Michael Seitz, being duly sworn, says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he verily believes it to be true.

MICHAEL SEITZ.

Sworn to before me this 1st day of August, 1882.

ALFRED R. PAGE,
[L. S.] *Notary Public, Kings County.*

Endorsed: Answer. Filed August 1, 1882.

14 In the Circuit Court of the United States for the Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY
against
MICHAEL SEITZ.

The plaintiff, for its reply to the defendant's answer to the plaintiff's complaint herein, shows to this honorable court—

First. As to — much of said answer as sets up any matter in avoidance of the cause of action set forth in the complaint the plaintiff, on information and belief, denies each and every allegation thereof in that behalf in said answer alleged.

Second. As to so much of said answer as sets up any recoupment,

offset, or counter-claim plaintiff denies, upon information and belief, each and every allegation in that behalf in said answer alleged; and plaintiff demands judgment as in said complaint prayed for.

JOHN H. V. ARNOLD,
Attorney for Plaintiff, No. 206 Broadway, New York City.

15 EASTERN DISTRICT OF NEW YORK, } ss:
State of New York, County of Kings, }

John H. V. Arnold, being duly sworn, says that he is the attorney for the plaintiff in the foregoing reply named; that he has read said reply; that said reply is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he verily believes it to be true; that the grounds of deponent's information and belief are communications made to him by the plaintiff and its officers, and the reason why deponent makes this verification is that none of plaintiff's officers are now within the State of New York or within the city and county of New York, wherein deponent resides, nor within the county of Kings, wherein deponent makes this verification.

J. H. V. ARNOLD.

Sworn to before me this 21st day of August, 1882.

[L. S.] RICHARD P. MORLE,
Notary Public, Kings County, N. Y.

Endorsed: Reply. Filed August 21, 1882.

16 At a stated term of the circuit court of the United States for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on Friday, the 12th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable William J. Wallace, circuit judge.

THE BREWERS' REFRIGERATING MACHINE COMPANY
against
MICHAEL SEITZ.

Cause called for trial.

Jury drawn and sworn.

Appearances: John H. V. Arnold, for plaintiff; James A. Whitney, for defendant; Charles Jackson, counsel for defendant.

Evidence submitted.

Judge directed verdict for plaintiff for $13,087.00.

Jury find for plaintiff in the sum of $13,087.00.

Verdict recorded.

Endorsed: Extract from minutes. Filed 12th February, 1888.

17 Circuit Court of the United States, Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY
against
MICHAEL SEITZ. } Judgment.

FEBRUARY 13, 1886.

The issues in this action having been brought on for trial before Hon. William J. Wallace, judge, and a jury, at a term of this court held at the United States court-rooms, in the city of Brooklyn, on the second Wednesday of February, 1886, and the issues having been tried on the 12th day of February, 1886, and a verdict for the plaintiff having been duly directed by the court and rendered on said day for thirteen thousand and eighty-seven dollars against the defendant, now, on motion of John H. V. Arnold, attorney for plaintiff, it is adjudged that the said The Brewers' Refrigerating Machine Company, the plaintiff, recover of the said Michael Seitz, the defendant, the said sum of thirteen thousand and eighty-seven dollars, and have execution therefor.

By the court:

B. LINCOLN BENEDICT, *Clerk.*

Dated Brooklyn, February 13, 1886.

Endorsed: Judgment-roll. Filed and entered this 13th day of February, 1886.

18 United States Circuit Court, Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY
against
MICHAEL SEITZ. }

I hereby consent that R. D. Benedict, Esq., be substituted in my place as attorney in the above-entitled action.

Dated New York, March 2, 1886.

JAMES A. WHITNEY.

Endorsed: Substitution of attorney. Filed March 1st, 1888.

19 U. S. Circuit Court, Eastern District of New York.

THE BREWING REFRIGERATING COMPANY
against
MICHAEL SEITZ. } At Law.

I hereby consent to the substitution of Messrs. Dickerson & Dickerson in my place and stead as attorneys for the defendant in the above-entitled action.

New York, Dec. 3, 1887.

R. D. BENEDICT,
Def't's Attorney.

On reading the foregoing consent it is ordered that Messrs. Dickerson & Dickerson be substituted as defendant's attorneys in the above-entitled action.

N. Y., Dec'r 6, 1887.

W. J. WALLACE.

Endorsed: Consent to substitution of Dickerson & Dickerson as defendant's attorneys. Filed and entered Dec. 6th, 1887.

20 U. S. Circuit Court, Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY
against
MICHAEL SEITZ.

Present: Hon. Charles L. Benedict, district judge, holding the court.

An order having been made to show cause why the judgment entered herein on the thirteenth day of February, 1886, should not be vacated and set aside for the purpose of enabling the defendant to prepare a bill of exceptions for a review of the case, and on hearing counsel for the respective parties, it is now—

Ordered that on the filing by the defendant of a bond, with two sureties to be approved by plaintiff's attorney, in the sum of twenty-seven thousand dollars, conditioned for the payment to the plaintiffs of the amount of the said judgment in case a writ of error shall not be issued to review the judgment which shall be re-entered herein and proceedings on said judgment stayed by the giving of a proper supersedeas bond, the said judgment entered on the thirteenth day of February, 1886, and the execution and levy thereon
21 be, and the same is hereby, set aside and vacated, and the plaintiff's proceedings on the verdict herein are thereupon stayed for twenty days to enable the defendant to make a bill of exceptions and have the same settled.

And it is further ordered that a copy of said bond be served on plaintiff's attorney, and that the sureties on said bond shall justify on notice to plaintiff's attorney, who may examine them in respect to their sufficiency, and such bond shall not be effectual for any purpose until approved as aforesaid by a judge having jurisdiction to approve the same after justification as aforesaid; and as a further condition of this order defendant shall pay all fees of the marshal on the execution issued herein, and shall also pay at or before the approval of said bond, to plaintiff's attorney, the sum of $10.80, paid by him for clerk's fees, and plaintiff shall have the right to tax and include any costs or disbursements *he* may be entitled to in this action and include same in any judgment *he* may hereafter enter herein.

And it is further ordered that on the giving of the proper supersedeas bond for a stay of proceedings on the judgment when re-entered the bond specified in this order shall be given up and cancelled.

CHAS. L. BENEDICT.

Feb. 26, 1886.
2—382

Endorsed: Order. Filed and entered this 26th day of February, 1886.

22 Circuit Court of the United States for the Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY, Complainant, *against* MICHAEL SEITZ, Defendant. } Judgment.

Present: Hon. E. Henry Lacombe, circuit judge.

MAY 4TH, 1888.

The issues in this action having been brought on for trial before Hon. William J. Wallace, judge, and a jury, at a circuit of this court held at the United States court-rooms, in the city of Brooklyn, on the 12th day of February, 1886, and a verdict for the complainant having been duly directed by the court and rendered on said day for thirteen thousand and eighty-seven dollars against the defendant, on which judgment was entered on February 13, 1886, in favor of the complainant and against the defendant for the said sum of thirteen thousand and eighty-seven dollars, and an order having been subsequently made and entered herein on Feb-
23 ruary 26, 1886, vacating and setting aside said judgment, upon the terms in said order provided, for the purpose of enabling the defendant to prepare a bill of exceptions for a review of the case, and such bill of exceptions having been made and signed by Hon. William J. Wallace, judge, and filed in the office of the clerk of this court, and the complainant now applying to this court to have judgment entered upon said verdict, and the complainant's costs having been duly taxed, upon notice, at the sum of seventy-one $\frac{82}{100}$ dollars, now, on motion of John H. V. Arnold, attorney for complainant, it is—

Adjudged that the said The Brewers' Refrigerating Machine Company, the complainant, recover of the said Michael Seitz, the defendant, the said sum of thirteen thousand and eighty-seven dollars, the amount of the verdict aforesaid, with interest thereon from February 12, 1886, amounting to seventeen hundred and fifty-one $\frac{09}{100}$ dollars, together with the sum of seventy-one $\frac{82}{100}$ dollars, costs and disbursements as taxed herein, amounting in the whole to the sum of fourteen thousand nine hundred and nine $\frac{91}{100}$ dollars, and have execution therefor.

By the court:

B. LINCOLN BENEDICT, *Clerk.*

Enter.
May 4.
E. H. LACOMBE.

Endorsed: Proposed judgment and notice. Filed May 4, 1888.

24 United States Circuit Court, Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY
against
MICHAEL SEITZ.

This cause came on for trial before Hon. William J. Wallace, circuit judge, and a jury, at a term of this court held in the United States court-house, in the city of Brooklyn, on the 12th day of February, 1886.

Appearances: John H. V. Arnold, Esq., for the plaintiff; James A. Whitney, Esq., for the defendant; Mr. Jackson, of counsel.

A jury having been empanelled and sworn, counsel, to meet the issues on the part of the plaintiff, called BETTE J. EILS, who, being duly sworn and examined as a witness, testified that he resided in Washington, District of Columbia; that in 1879 he filled the offices of secretary and treasurer of the plaintiff and is the person who signed the contract which is set forth in the complaint on behalf of the plaintiff. I was its secretary and treasurer until about 1883. I know the defendant. I know of my own knowledge that a number 2 refrigerating machine as constructed by the Brewers' Refrigerating Machine Company was put into the brewery of the defendant named in this contract. I am familiar with the ma-

25 chines of the character referred to, number 2 size refrigerating machines, of the plaintiff's construction; have seen them put in other breweries. This No. 2 size refrigerating machine was put into Mr. Seitz's brewery, in Maujer street, in the spring or summer of 1879, and was completed in August, 1879, and put in operation there. Its construction must have been begun some time in May—that is, the erection of the machine in the brewery. I visited the brewery during that spring and summer on several occasions. When I say it was put in there and completed I mean I saw that myself. It is a very large machine, a powerful machine; at least ten tons in weight, I should think. I have not weighed it. It is a large machine, composed of two pumps, that were ten inches in diameter, I believe, and had about twelve-inch stroke, and they were built to compress ammonia to a pressure of from 125 to 150, 175 or even 200 pounds per square inch. In addition to that it had a steam-engine attached to these pumps for driving them. In addition to that it had a very large condenser, that contained perhaps ten or fifteen hundred feet of pipe—three-quarters of an inch of gas-pipe. It covered two rooms. One of the rooms must have been about ten by twenty or ten by fifteen, where we had the pumps and the engine and condenser; and another room, that we called the cold room, was upstairs overhead; that, I should say, was about twenty feet square, in that neighborhood, where we had the cooling apparatus. It was put in operation in Mr. Seitz's brewery in the latter part of

26 August, 1879. I was there at the time myself; saw the machine in operation; went through Mr. Seitz's cellars with him and examined the work that it was doing down there. As provided in the contract, a competent man was furnished by the plaintiff to

superintend its erection, to put it up. His name was Thomas Cook and he is here present. He had done work in our machinery, to my personal knowledge, in Alexandria, Virginia; put up a machine there. He was a machinist, the inventor and patentee of this machine. I had a conversation after it was put in operation, in 1879, with Mr. Seitz, the defendant, in respect to the payment for this machine. After we had been in Mr. Seitz's cellar looking at the temperature of the rooms, of the cellars in which the machine was operating, we went back up into his office, and I said in substance to him, "We have now fulfilled our contract, and I will ask you to pay us—to make the first payment of $4,725, and give me notes for the balance." He said, "No, I haven't the money now, and I can't pay you just now. I can let you have $500 or so." I refused to take the $500 at that time, and with that I said that if he wasn't prepared to pay just then I would call again after awhile; and with that I left. Subsequently I wrote him. I received the letter now shown me from him. After looking at this letter I judge that it was during September, 1879, instead of August, that I was in Brooklyn seeing this machine in operation in his cellars. It was a few days previous to this letter.

27 Letter read in evidence and marked Plaintiff's Exhibit 1.

"Office of N. Seitz's Son, Brooklyn City Brewery, 258–264 Maujer street, Brooklyn, E. D.

"BROOKLYN, *Sept. 26th*, 1879.

"Mr. B. E. J. Eils, secretary, Washington.

"DEAR SIR: I write to you to let you know that I was compelled to stop your machine yesterday, as I cannot get my cellars cold enough to answer my purpose. The cellars are always under 46 & 48 degrees, while the machine is continually at work. My thermometer, hanging outside of a window, shows a temperature this morning of 43 degrees; therefore it would not be any use to let the machine run, which you know yourself is only connected with expenses. This day I am going to put ice into my cellars to get the required temperature for brewing purposes. I am sorry to say that I cannot run the machine any longer unless you can furnish, as promised in the start, 40 degrees for 150,000 cubic feet, and ask you besides to pay my losses I had to sustain during the past summer on account of your machine did not work satisfactory. Hoping to hear from you soon—

"I am yours respectfully, N. SEITZ'S SON,
"P'r BRAM."

I wrote to him after the receipt of this letter. This is a copy of the letter I wrote.

28 Same read in evidence and marked Plaintiff's Exhibit 2.

"WASHINGTON, D. C., *Sept.* 29, 1879.

"M. Seitz, Esq., Brooklyn, N. Y.

"DEAR SIR: Your letter of 26th inst. received and contents noted.

We regret that you have stopped the machine. It was doing its work well. The cooling down of your cellars includes the cooling down of the beer stored therein, which you seem to wholly overlook, and all this cannot be done except by giving the machine a week or two of steady work.

"When the contract was made it was understood that the machine was to operate on the fermenting-room and the two cellars under it, and that all the rooms were or were to be made tight and well protected. The machine was located accordingly in the most favorable position for that purpose. You afterwards altered your mind and made it send the cold air into unprotected cellars at a distance of upwards of 150 feet from the cold room, which must of necessity lessen the cooling effect of the cold air proceeding from the cold room by the continued supply of warmth from the surrounding earth. We have fulfilled our part of the contract to the letter, and had the right to ask for a settlement, as we did on Sept. 24th, '79, as the machine was running steadily and doing good work besides.

29 "No promise of cooling down 150,000 cubic feet to 40, F., was ever made, verbally or otherwise; on the contrary, your request through Mr. Chas. Stoll for guarantee from us to cool to about that temperature was distinctly declined by us in writing, of which we have a copy.

"However, we are not only willing but anxious to continue doing everything we can do in reason to give you entire satisfaction. We find that the fast-running engine may prove a source of trouble and expense to purchasers of our machines; we therefore propose to put in extra slow going engines. We are already contracting for them and shall be ready in a few days to begin putting one in your brewery at our own expense. To do it we must, of course, have your consent and co-operation and the assurance from you that you will run the machine thereafter.

"As regards the effectiveness of your machine, it works fully as well if not better than machines just like it which we put up in Philadelphia and Morrisania. The operation of these last-mentioned machines on the cellars and fermenting rooms has been very satisfactory to the respective brewers.

"On calculating the capacities of their rooms we find that they are about as capacious as the cellars on which your machine operates, but their rooms are well protected, while yours are unprotected. We may say here that both Mr. Chas. Wolters and Messrs. J. & L. F. Kuntz have settled with us for their machines, showing that they are satisfied. We may also state that Mr. Rob't Portner, of

30 Alex'r., has just ordered a second machine the same size as yours for his new brewery.

"Mr. Cook will call on you to talk matters over further. Of course if you refuse to co-operate with us hereafter, which we should regret exceedingly, the only course left us would be to leave the machine just as it is now and insist upon the fulfillment of your part of the contract, our part of which we consider to have made good some time since. That course would be very distasteful to us and we trust

that we shall not be forced to do it, but that our relations with you may remain amicable always.

"Yours truly, THE BREWERS' R'F'G MACH. CO.
"B. E. J. EILS, *Sec'y.*"

I wrote another letter on November 10th. This is a copy of it.

Same read in evidence and marked Plaintiff's Exhibit 3.

PL'FF'S EXHIBIT 3.

"WASHINGTON, D. C., *Nov.* 10, 1879.

"M. Seitz, Esq., Brooklyn, N. Y.

"DEAR SIR: We are very loath to commence legal proceedings against you to enforce the payment for the machine we put in your brewery in accordance with the terms of our contract, yet we
31 shall be obliged to do so against our will unless you recede from the position you have taken. Although we claim to have executed our part of the contract to the letter, we are still prepared to do what we have told you verbally. We shall wait a reasonable time for your reply and hope that it will be such as will save us the disagreeable undertaking of a lawsuit.

"Yours truly, B. E. J. EILS, *Secretary.*"

Defendant never paid anything on the contract price. I believe he paid a workman $90 or $100 that we had at work on the machine. We never received the notes nor the cash.

On cross-examination he testified:

I left the machine in Seitz's brewery. I don't know what has become of it. It was in good working order the last time I saw it. I do not know of my own knowledge that defendant ever paid anything on the contract. I merely heard this from the workmen. I think somewheres about $90.

After cross-examination of the witness defendant's counsel asked to amend the answer to set up that defendant entered into that contract by reason of fraudulent representations on the part of this company.

The COURT: Inasmuch as the plaintiffs are not taken by surprise by this request to amend, but concede that they can meet the
32 new issue and do not require a postponement of the case, I shall allow the amendment upon the condition that if the defendant recovers a verdict there shall be no costs. I think the defendant should state explicitly the facts which he alleges to have been falsely represented in order that we may have a distinct issue.

Mr. JACKSON:-We have prepared an amendment: First, an amendment of the second folio, that the machine placed in the defendant's brewery was worthless and incapable of operating to produce the results represented by the plaintiffs to this defendant as an inducement to enter into the aforesaid agreement.

Second, on the ninth folio; and relying upon the false and fraudulent representation to him, the said defendant, made by or on

behalf of said plaintiffs, and which were known to said plaintiffs to be false, he, the said defendant, did permit an agent of the plaintiffs to put in a machine.

Those are the general allegations, and your honor directs us to make them more specific.

Mr. WHITNEY: I will read the amendment as we have prepared it. We ask that the following be inserted between the second and third folios:

"That said plaintiffs represented that this machine to be so furnished was capable of cooling certain rooms in the brewery of defendant, which said rooms were well known to the agent or agents of complainant and had been examined by said agent or agents, and that said machine when set up and operated was not so capa-
33 ble and failed to perform the work for which, upon the said representations of plaintiffs, the said machine was contracted for by said defendant. And said defendant further said that he contracted to purchase said machine upon the guarantee by the complainant to said defendant that said machine would cool and was capable of cooling certain rooms in the premises or brewery of defendant to the temperature required in the manufacture or production of beer, and upon said guarantee only the defendant entered into said contract.

"And defendant further says that said machine when furnished to the defendant and operated on defendant's premises was wholly useless and worthless and failed utterly to perform the work which the complainant warranted and guaranteed to defendant that the said machine should perform in the business and upon the premises of defendant.

"And defendant further says that he, the said defendant, entered into said contract upon the representations of the plaintiffs to the effect that the No. 2 machine referred to in the contract set forth in the complaint would cool and was capable of cooling a space of 150 thousand (150,000) cubic feet of air, continuously, to a temperature sufficiently low for the purpose of brewing or manufacturing beer in the defendant's brewery or premises—that is to say, to a temperature in the neighborhood of forty degrees Fahrenheit.

"And defendant further says that the plaintiffs, at and be-
34 fore the time when the said contract was made, knew that the representations made to the defendant as aforesaid that the said machine would perform and was capable of performing certain work on the premises of the defendant were false and unfounded and well knew that the said No. 2 machine was not capable of performing the work which plaintiffs represented it to be capable of performing and knew that said machine would be worthless to the defendant for the purposes for which the defendant contracted for the same and for which the said defendant intended to use the said machine."

The motion was granted.

THOMAS COOK, being sworn as a witness for the plaintiffs, testified as follows:

I reside in New Orleans. In the spring or summer of 1879 I had the superintendence of putting up and erecting in defendant's brewery in Maujer street, Brooklyn, the machine of the plaintiff's, size No. 2, spoken of here. I erected the machine on defendant's premises, and when it was completed started it and worked it, and it worked to my satisfaction. I operated it after it was completed perhaps a month. I am a machinist. I have had experience with these cooling machines—ice machines—for about nine years. I am now 59 years of age. I have been working 45 years continuously as a machinist. For the past nine years I have paid special attention to refrigerating machines This machine was put up in a workmanlike manner. I employed the best men I could get, and
35 I superintended the work and saw it done. I saw it very frequently.

On cross-examination he testified:

The purpose of this machine was producing cold air for the purpose of cooling beer. I noticed the effect after this machine was put in the defendant's brewery or in the chambers which the machine was intended to cool. I noticed it to some extent. The result was that the machine was working satisfactorily. It takes considerable time to cool a large brewery, and especially a brewery like that that was not protected.

The defendant, to meet the issues on his part, being called on his own behalf and duly sworn and examined, testified:

I am the defendant in this action and the proprietor of Seitz's brewery. I know the machine which was put in my brewery by the plaintiffs. I negotiated with the Brewers' Refrigerating Ice Company.

Q. Who was the man with whom you negotiated?

A. With both Cook and Eils, the gentlemen who have testified here. I had contracted for this machine with Mr. Cook and Mr. Eils, the gentlemen who have testified here, in the beginning of 1879, as I can recollect. They were both present at the time. They said they would cool one hundred and fifty thousand (150,000) cubic feet to forty degrees Fahrenheit. They looked over the rooms in the brewery, and said they would cool them by this machine; that is equal to about three and a half Reaumur. I do not know as we talked very often about it, but merely for to put up a ma-
36 chine for to cool the whole brewery. The price of the machine was agreed upon, and was matured in the contract on which they sue.

Q. It was on their representations, and theirs alone, that you purchased the machine?

Objected to as leading.

By the COURT:

Q. You relied on their representations, I suppose?
A. Yes.

By Mr. JACKSON:

Q. You bought the machine and it was put up?
A. Yes.
Q. Did it do this work?
A. No, sir; nowheres near.

They put up the machine. They asked me, or we got talking about it, in what rooms we wanted it to work first. I told them we might begin to cool the lower rooms first because I had ice enough in the upper chambers and in the ice-house. I had ice enough there. The ice-house has four rooms. The ice-box, the ice, is above the four rooms—it cools these rooms; and down in the cellar we have five rooms. They promised to cool everything, and I told them to go on and connect with the lower rooms first, because I had ice enough in the upper rooms, I thought, to leave them. The- could cool the lower rooms first, and after they cooled them, by that time we could connect the upper rooms; and as they cooled down the lower rooms they couldn't get the rooms cold. I had the ice down there, and it let the ice melt away, and the rooms wouldn't get colder; the ice was melted away, and it got warm instead of colder—what they promised to be colder than what I could cool with ice. I give them all the chance—they had been working there about a week or
37 two, I don't remember how long, and then they said that the shoot that the air went down into the rooms was too small, the shoot was too small, and that was the only fault that they couldn't cool the rooms cold enough, the cellar rooms cold enough, what they were working in; so he stopped the machine; we stopped the machine. They said they wanted to put in a larger shoot, that if they put in a larger shoot they could keep the rooms cold enough, so we put in a larger shoot on my own expense. The party who put up the machine designed it, in the first place, as to size and everything else, just as they wanted it put up. The machine was no use to us as long as it didn't do the purpose what they promised. I gave them a chance, put on larger shoots; they enlarged the shoots so much larger, and we started the machine up again and worked for about a week or two longer, something like that, and as soon as they began to work I left my ice go off again, and as soon as the ice was off the temperature went up again the same as the first time; the cellars got warm again, and it went up again to forty-eight degrees Fahrenheit, and the cellar began to get musty, and smell, and everything else, because the temperature wasn't cool enough. I worked on for about a week or two longer, I don't now quite remember, and through that I saw that I had damage to my beer, and would damage a good deal more if I kept on working it any longer. I stopped the machine, sent Mr. Eils a letter that I wouldn't work

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any longer with this machine because it didn't do its work as he promised or as they promised.

38 The machine is standing there and the rooms we had been working in are about half the capacity what they promised, about half or a little more. I don't quite recollect how much beer I lost by reason of what they promised. I suppose it was somewheres around three hundred barrels or so. We let it run or sold it to ale brewers, or something or other; I don't quite recollect; I don't know whether we let it in the sewers or sold it to the ale brewers; I don't recollect about that; but that ain't all what I have lost. There was a good deal of beer that came back from customers; I couldn't mention how much was returned, and we had to let it run, and we lost a good deal of customers through that, customers doing business with us for many years before, for damaged beer of the warm cellars.

Prior to putting the machine into my brewery Mr. Eils and this other gentleman here went and examined my place. They went before the written contract was made. They were both at my place and examined my premises. The last shoots that was put up were put up at my expense.

And on cross-examination:

I had seen Cook and Eils before the day when this contract was signed. I know they went through the rooms before anything of the contract was signed. I don't recollect whether it was the same day or not—the day the contract was signed. I know they were there the same day or before that. I had seen them before that and talked with them about the machine. The conversation which I speak of, in which I said they said they would cool off a certain amount of space in my brewery, was at the time the con-

39 tract was signed. I don't recollect whether it was not on the previous occasion, but I know the time. The day the contract was signed we were talking about it. Before the machine was put in there, or about the time it was being put in, I went to Philadelphia to Walter's brewery; a man named Hugo Bergner was with me, and we saw one of the machines in operation there. After that this machine was put into our place. I saw how it operated at Walter's, but they only worked with half the machine, only in a few rooms; they had it working in a few rooms, half the machine. They said the machine wasn't quite complete, and the room wasn't cold enough by the times I was there; but they say, according to the whole machine, when it was completed it would do what they said. The time the machine was put in it was boxed in and felted in, the walls were felted in so the cold would stay tight. My carpenter put the shoots there, and whatever they wanted of carpenter work I was to put there. There were no shoots there before the first shoots were put in by my carpenter, and after that Cook and Eils found fault with them, and there were some others put in also by me at my expense. They were to cool everything—cool the rooms below, the ice chambers, and the cellars below. Finally, I selected

the cellars to cool first, and after they were satisfactory they would cool the upper rooms. These cellars were not lined.

Q. Did you have a talk with Mr. Eils during the time that this machine was put in there, long after this contract, in which
40 Mr. Eils called your attention to the fact that your cellars were unprotected, and that it was impossible for any machine to cool them in that condition?

A. It isn't necessary to protect any cellars that is 25 feet deep. There is enough ground without having any protection; that is protected enough. We run an ice machine now and have ever since, and have it plenty cool enough; more cold than we want.

Q. You have not answered my question. Didn't Mr. Eils have a conversation with you in respect to that?

A. I don't recollect.

CHARLES STOLL, being duly sworn and examined as a witness for defendant, testified:

I reside at 134 Broadway, Brooklyn; my business is engineer and architect. I know Mr. Seitz, the defendant, and the Brewers' Refrigerating Company. I heard a conversation between Mr. Seitz and Mr. Cook or Mr. Eils before the purchase of this refrigerating machine. It was in Mr. Seitz' office. I and Mr. Seitz and Mr. Eils, I think, and Mr. Cook were present.

Q. What was said?

Objected to as immaterial and irrelevant, and that all conversations were merged in the written contract. Objection overruled. Plaintiffs except.

—. They were talking about buying a machine, ordering a machine there, for to refrigerate and take the place of ice, and
41 they specified the time when the machine was to be placed and when the machine was to be in operation and what the machine should do.

Q. What was said?

A. They agreed to put a machine in there that would cool that whole house off better than we used to do with ice.

They said they would furnish a temperature of two and a half degrees, from two to two and a half Reaumur; that they would keep the temperature—maintain that temperature of two and a half or two degrees. They measured the rooms—we went through and showed them all the rooms there was that was necessary to be cooled off, and then agreed that they knew all about it. There was a couple more cellars under ground that I told Mr. Cook to go down and look at them himself; he didn't care about going down in the cellars. He saw all the rest of them, and I spoke to him again and told him he had better go down and look at them, so he would know exactly what he was talking about. One of the men went down with him with a lamp, and Cook came up and told me it was all right; that he would furnish that cellar and keep it the same as the rest, two and a half.

I hold three patents on ice-houses, and I keep the temperature

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I hold three patents on ice-houses, and I keep the temperature

down as far as three, three and a quarter, and three and a half myself. This apparatus didn't accomplish the fact at all. We have the ice-houses built for brewers—they are built especially; they are rooms and they are divided off and insulated with felt, four inches of hair felt with paper layers in between, and we have them
42 with slides, valves, so as to let the gas off and let the cold air come down. Since this ice machine came up, where we used to carry about two thousand tons of ice in an ice-house they carry no ice, or are supposed to carry none, and they maintain a temperature where we could get down the farther-st to three or three and a half, which was the very best we could do with ice; they come down as far as one and two and two and a half and one degrees; they have some cellars they would like to get down to one, some they wouldn't care if it wasn't over two or three, but as a general thing it is in their command. When we change- this ice-house here and placed the ice machines, I put a room around this machine myself and put four inches of felt and made them perfectly air-tight, so nothing could escape and no air could get in. When they got the machine in operation there was some ice left, because they didn't get it done in time; they had to put ice in there to keep the beer at a low temperature, and being behind time with the machine there was considerable ice left there. When they started up the ice melted away in spite of the machine. The ice should have stayed there and stopped and not melted away at all, but it melted away and Mr. Seitz had to continue on to furnish ice with the machine. A machine like that should have let no ice melt away whatever. We have got a refrigerating machine where you can go the whole summer without ice, where, if any water is made by the hydrant inside, it would freeze fast, and this machine would not do it. The best this machine done was seven and eight degrees, and we do better
43 with the ice-house—we go down to three and three and a half.

On cross-examination by plaintiff's counsel witness testified:

This felt lining that we enclosed the ice machine up, that was around the whole ice-house, the whole refrigerator building. It was around all the cellars above ground; below the ground we never put any felt there. The lower cellars above ground were felt-lined. I was doing some alterations there at that time.

I sent this telegram now shown me to Mr. Eils.

Same read in evidence and marked Pl'ff's Ex. 3.

"The Western Union Telegraph Company.

"Dated WILLIAMSBURGH, *Jan.* 8, 1879.

"Received at 1.16.

"To Mr. B. E. J. Eils:

"Would like to have you and Cook here Saturday morning; look at a building to cool off and make contract.

"CHAS. STOLL.

"20 pd. Wm. J."

In reply to that telegram they came on, but that has nothing at all to do with this job here; that is dated January 8, 1679. This letter now shown me, dated January 13, 1879, is one I sent to Mr. Eils:

PL'FF'S EXHIBIT 4.

"134 BROADWAY, B'KLY., N. Y., *Jan'y* 13, 1879.

"Mr. Eils.

44 "DEAR SIR: In speaking to Mr. M. Seitz to-day he said that your agreement was very unsatisfactory to him; in fact, that before he would get the machine that he wanted a written guarantee from you that you would cool his building, which you have seen, to 3½ R. and keep*t* it at that all the time; otherwise he would not have the machine, as he would have no use for it, as he would have to put himself to great expense and great risk at the same time.

"Very truly, CHAS. STOLL."

Same read in evidence and marked Plaintiff's Exhibit 4.

I suppose I got an answer to it; it is so far back that I couldn't say positively. The contract is dated January 11, 1879. This letter, Exhibit 4, is dated January 13, 1879—two days after. I remember the letter which I now read in this letter-press copy book:

PL'FF'S EXHIBIT 5.

"WASHINGTON, D. C., *Jan'y* 20, 1879.

"Chas. Stoll, Esq., Brooklyn, N. Y.

"DEAR SIR: On my return to Washington I found your favor of 13th inst., and also received your telegram this morning.

"I regret to hear that Mr. Seitz feels dissatisfaction with the contract made with him. The gu-rantee he now asks for in addi-
45 tion it would not be proper for us to give, as Mr. Seitz himself will see on further reflection, we think. The maintenance of a certain temperature in his rooms is not solely dependent upon our machines; in fact, there are a great many other things entirely beyond the control of the machine which influence this temperature. The mode of working the rooms, the water used for washing, the fermentation, and many other things might be mentioned in this connection as matters which we cannot control, and which nevertheless are most important considerations in the maintenance of a given temperature. We are confident from the experience with the Portner machine during last summer and fall that the machine sold to Mr. Seitz will not only give him the desired low temperature, but will, in addition, give him what he never before had in the warmer months, namely, pure and dry air. The machine we are building for him is in many respects far superior (aside from size) to the Portner machine, and when he has had it a year we believe he would not part with it for any money if he could not replace it. That we must decline to guarantee what Mr. Seitz asks for is simply

for the reasons stated. There are too many side considerations entirely beyond the control of the machines.

"We would add that we have not in any instance been asked for such a guarantee as a condition of sale, but that all the parties to whom we have sold bought on our representations and what they have seen and heard of the working of the Portner machine.

"Yours truly, B. E. J. EILS, *Sec'y.*"

46 Same read in evidence and marked Plaintiff's Exhibit 5.

I sent the telegram now shown me; sent it on January 21, 1879:

PL'FF'S EX. 6.

"*Half-Rate Message.*

"The Western Union Telegraph Company.

"WILLIAMSBURGH, N. Y., *Jan'y* 21, 1879.

"Received at 10.44 p. —.

"To Mr. B. E. J. Eils, 709 G St., W., D. C.:

"Will you defend any infringement suits against Mr. Seitz for using your machine? Please write him about it at once.

"C. STOLL.

"20 pd. rft. m."

Same read in evidence and marked Plaintiff's Exhibit 6.

This letter, also dated January 23, 1879, is to Mr. Eils from myself:

PL'FF'S EX. 7.

"134 BROADWAY, B'KLYN, N. Y., *January* 23, 1879.

"Mr. B. J. Eils.

"DEAR SIR: The machine sold to Mr. M. Seitz is all right and can be sent at any time that it is ready, but Mr. Huber has
47 declined, at least for this season.

"Very truly, CHAS. STOLL."

Same read in evidence and marked Plaintiff's Exhibit 7.

This letter now shown me is a letter to Robert Portner, president of the plaintiff, from me, dated March 16, 1879:

PL'FF'S EXHIBIT 8.

"BROOKLYN, *March* 16, '79.

"Robert Portner, Esq.

"DEAR SIR: Yours of 14th at hand. I will inquire for a kettle of 120–150 lbs. and report to you. Mr. Seitz would like to have you to commence at once putting up his machine. He says if Mr. Cook was here he would arrange so as to work at all parts at once, and Mr. Cook's superintendency to save him all his time he could, &c. Please attend to it.

"Yours, CH. STOLL."

Same read in evidence and marked Plaintiff's Exhibit 8.

I think there were four rooms in this brewery that were to be cooled, and two or three below. I couldn't say exactly now, it is seven years ago, and I haven't been to the cellars since; four
48 besides the cellars. I could not say how many cellars; I haven't been there in seven years.

I went to Alexandria and saw the machine working in Portner's brewery, and I did a good deal of work for him there. I saw the machine there. I guess it was not before this contract with Seitz. As good as I can remember, I don't think it was; I think it was afterwards. I believe I told Seitz that they would not make a guarantee when I got this letter from Eils. I don't know exactly. I must have shown him a letter by the answer I got.

JULIUS J. SUCKERT, being sworn and examined as a witness for the defendant, testified:

I am a chemist and refrigerating expert. I have been engaged in that business since 1878. I am now associated with the National Ice Machine Company. I have made a specialty of artificial refrigeration, with application to the cooling of beer and the like. There are various machines in use. There are the various systems; for instance, the usual ammonia machines, but principally those in use in this country were ammonia compressing machines. This is one of that class of machines. I have examined the machine; it is not in active operation anywhere, to my knowledge. I have seen it in operation.

Q. What does it do?

Objected to unless the particular machine in question here is referred to.

Q. Did you see the machine for which these people bring action?

49 A. Not that identical one in operation. I saw the one at Bergner & Engel's brewery in Philadelphia.

Mr. ARNOLD: The point is whether we made any representations that were fraudulent in their character with regard to this identical machine.

The COURT: I am inclined to think your objection is a good one. Evidence as to what some other particular machine of the plaintiffs' manufacture has done when seen in operation by the witness I do not think is competent here.

Mr. JACKSON: I want to show by this witness that these representations concerning which we have had testimony were false. The only way I can get that from him is to ask him what he knows, if anything, as to the operation of the machine.

The COURT: You cannot defend this case upon the general theory that this machine was not a very good one. Your defence is that there were certain fraudulent representations made to your client, which induced him to enter into this contract. When you have

closed your case as to the representations made, then it will be soon enough for you to go into evidence to show that they were false.

JULIUS J. SUCKERT'S examination resumed.

By Mr. JACKSON:

Q. Do you know about Mr. Seitz's brewery as it was in 1879?

A. I have examined the brewery—the rooms he showed me as having been used at that period.

Mr. ARNOLD: That is not an answer to the question.

Q. Did you examine his brewery in 1879?

A. No, sir.

Q. When did you examine it?

A. About three weeks ago.

Q. Did you say that you were familiar with this machine
50 of the refrigerating company?

A. Yes, sir; I have examined one of the plaintiff's machines as it worked in Philadelphia, and seen the premises of Mr. Seitz.

Q. Does it refrigerate?

Objected to on the ground that the witness is not shown to have any knowledge on the subject; that he has sworn that he never saw the machine in question operate; and, further, that no evidence of fraud has been given. Objection sustained.

Q. Does it purport to produce cooling effects?

Objected to. Objection sustained. Defendant excepts.

Q. Is that machine capable, to your knowledge, of cooling any given quantity of air?

Objected to. Objection sustained. Defendant excepts.

Defendant rests.

51 Mr. ARNOLD: I move for a direction of verdict for the plaintiffs for the sum of $13,087, principal and interest, on the case as it now stands, saving my right, in case your honor denies, to go on with rebuttal. I think I am entitled to a direction of a verdict.

The COURT: I think you are.

WALLACE, *J.*:

GENTLEMEN: The only defence to this case which is worthy of any consideration is that the machine was sold to the defendant under fraudulent representations by agents of the plaintiffs. There is no evidence of fraud whatever in the case. There is evidence to show that the machine did not work satisfactorily. The jury are doubtless authorized to infer from the testimony in the case that it did not have the capacity of cooling 150,000 cubic feet to the degree stated. There is a written contract in this case. That contract contains no warranty; consequently, if the machine did not fulfill the expectation of the defendant or if it did not fulfill verbal

representations made at the time the contract was entered into by the agents of the plaintiffs, nevertheless the defendant has no defence. He would have a defence if he were able to show that false or fraudulent representations were made, because then the contract would be void; but there is no evidence to that effect in this case. Therefore, however unfortunate it may be for the defendant, the plaintiffs are entitled to a verdict.

52 Here is a case of a written contract. The machine has been built and put up pursuant to that contract, and the defendant cannot be permitted, upon the general theory that the machine is not a satisfactory article, to defeat the plaintiffs from recovery upon that contract.

A verdict is ordered for the plaintiffs.

Mr. JACKSON: We beg leave to except to your honor's ruling.

United States Circuit Court for the Eastern District of New York

THE BREWERS' REFRIGERATING MACHINE COMPANY, Plaintiff,
against
MICHAEL SEITZ, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

53 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Brooklyn, this 22nd day of April, in the year one thousand eight hundred and eighty-two.

B. LINCOLN BENEDICT, *Clerk.*

JOHN H. V. ARNOLD,
Plaintiff's Att'y; Office and Post-Office Address, 206 Broadway N. Y. City, New York.

Circuit Court of the United States, Second Circuit, Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY
against
MICHAEL SEITZ.

The Brewers' Refrigerating Machine Company, the plaintiff and complainant herein, by John H. V. Arnold, its attorney, complaining of the defendant, Michael Seitz, shows to this court—

That on or about the 11th day of January, in the year one thousand eight hundred and seventy-nine, the said plaintiff entered into an agreement in writing to and with the defendant herein in the words and figures following, to wit:

54 "This agreement, made this 11th day of January, A. D. 1879, between the Brewers' Refrigerating Machine Company, of Alexandria, Va., party of the first part, and Michael Seitz, of Brooklyn, N. Y., party of the second part, witnesseth:

"That the party of the first part hereby agrees and contracts to supply the party of the second part with a No. 2 size refrigerating machine, as constructed by the said party of the first part, by the 15th day of March next or as soon thereafter as possible, the machine to be delivered at the depot or wharf in Philadelphia, Penna., and to be put in operation in the brewery of the said party of the second part, at 258–264 Maujer Str., at Brooklyn, E. D., N. Y., under the superintendence of a competent man furnished by the said party of the first part.

"The party of the second part hereby agrees and contracts to pay to the said party of the first part for said machine the sum of nine thousand four hundred and fifty dollars ($9,450.00) in manner as follows, namely, four thousand seven hundred twenty-five dollars ($4,725.00) on the day when the machine is put in operation at the brewery of the said party of the second part, and the balance of four thousand seven hundred and twenty-five dollars ($4,725.00) in three equal instalments—that is to say, one thousand five hundred and seventy-five dollars ($1,575.00) for each instalment, payable respectively in one (1), two (2), and three (3) months after the day
55 when the machine is put in operation at the brewery of the said party of the second part, for which instalment the said party of the second part agrees and contracts to give his notes on the day last mentioned.

In witness whereof the parties have unto set their hands and seals in duplicate the day and year first hereinbefore mentioned.

THE BREWERS' REFRIGERATING MACHINE COMPANY.
B. E. J. EILS, *Secretary.* [L. S.]
MICHAEL SEITZ. [L. S.]

Witnesses:
CHARLES STOLZ.
THOS. COOK.

And, further complaining, this plaintiff shows that as soon after said contract was made as was possible, and in or about the month of April, 1879, it did supply and deliver the machine mentioned in and called for by said contract to the said defendant, and put the same up and put it in operation in the brewery of said defendant, who received and accepted the same, and that the plaintiff has in all respects fully complied with all the terms and conditions of said agreement therein contained to be on its part done or performed, and that on or about the 20th of September, 1879, and long prior thereto, the said machine had been put in operation at the brewery of the said defendant in said agreement mentioned; that the said defendant, although often thereto requested, had not
56 paid the sum of nine thousand four hundred and fifty dollars ($9,450.00) provided in and by said agreement by him to be

paid nor any part thereof, but has wholly refused to pay the same or to give the notes therein provided to be given by him, and has refused to pay the whole or any portion of the sum aforesaid, either in the manner or at the times provided for in said agreement or otherwise, and more than three months had elapsed before the commencement of this action from the date when the said machine was so put in operation at the brewery aforesaid; that said defendant is now justly indebted to the plaintiff in the sum of nine thousand four hundred and fifty dollars ($9,450.00) and interest thereon from the 20th day of September, 1879, for such machine.

And the said plaintiff further shows that said plaintiff is a corporation duly incorporated under the laws of the State of Virginia, and has its principal place of business in the State of Virginia, and is a citizen and resident of and located within the said State of Virginia, and has no residence, location, or place of business within the State of New York, and that the defendant is a citizen of and resident in the State of New York.

Wherefore plaintiff demands judgment against said defendant in the said sum of nine thousand four hundred and fifty dollars ($9,450.00), with interest thereon from the 20th day of September, 1879, besides the costs of this action.

JOHN H. V. ARNOLD,
Attorney for Plaintiff.

No. 206 Broadway, New York city.

57 SOUTHERN DISTRICT OF NEW YORK, } ss.:
State, City, and County of New York, }

John H. V. Arnold, of said city, being duly sworn, says that he is attorney for the plaintiff in the foregoing complaint named; that he has read the said complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that deponent's knowledge, information, and belief are derived from an inspection and possession of the original agreement in said complaint set forth and of the correspondence between the parties to the said action and from letters by him received from and personal communications by him had with the officers of the plaintiff, and that the reason why this verification is made by deponent is that none of the officers of said plaintiff are now within the city and county of New York, wherein deponent resides, nor within the State of New York or the second circuit.

J. H. V. ARNOLD.

Sworn to before me this 22nd day of April, 1882.

JOS. F. ARNOLD,
Notary Public, New York Co.

58 The Circuit Court of the United States for the Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY, Plaintiff,
against
MICHAEL SEITZ, Defendant.

The answer of the defendant to the complaint of the plaintiff herein respectfully shows to this honorable court:

I. That he admits that on or about the 11th day of January, in the year 1879, he signed and executed an instrument in writing in words and figures substantially as in the said complaint, at folios numbered 2, 3, 4, 5, and 6, contained and set forth.

II. That he denies the allegations in folios numbered 7 and 8 of said complaint contained, and alleges and avers that plaintiff failed to put in operation a refrigerating machine in the brewery of the defendant, as agreed in said instrument, and that plaintiff did not cause the said refrigerating machine to be put up under the superintendence of a competent man; that the machine placed in defendant's brewery was worthless and incapable of operating to produce the results represented by plaintiff to this defendant as an inducement to enter into the aforesaid agreement.

That said plaintiffs represented that this machine to be so
59 furnished was capable of cooling certain rooms in the brewery of defendant, which said rooms were well known to the agent or agents of complainant and had been examined by said agent or agents, and that said machine when set up and operated was not so capable and failed to perform the work for which, upon the said representations of plaintiffs, the said machine was contracted for by said defendant; and your defendant further said that he contracted to purchase said machine upon the guarantee by the complainant to said defendant that said machine would cool and was capable of cooling certain rooms in the premises or brewery of defendant to the temperature required in the manufacture or production of beer, and upon said guarantee only the defendant entered into said contract.

And defendant further says that said machine when furnished to the defendant and operated on defendant's premises was wholly useless and worthless and failed utterly to perform the work which the complainant warranted and guaranteed to defendant that the said machine should perform in the business and upon the premises of defendant.

And defendant further says that he, the said defendant, entered into said contract upon the representations of the plaintiffs to the effect that the No. 2 machine referred to in the contract set forth in the complaint would cool and was capable of cooling a space of 150 thousand (150,000) cubic feet of air continuously to a temperature sufficiently low for the purpose of brewing or manufacturing beer in the defendant's brewery or premises—that is to say, to a
60 temperature in the neighborhood of forty degree- Fahrenheit.

And the defendant further says that the plaintiffs, at and before the time when said contract was made, knew that the representa-

tions made to the defendant as aforesaid that the said machines would perform and was capable of performing certain work on the premises of the defendant were false and unfounded, and well knew that the said No. 2 machine was not capable of performing the work which plaintiffs represented it to be capable of performing, and knew that said machine would be worthless to the defendant for the purposes for which the defendant contracted for the same and for which the said defendant intended to use the said machine.

That said machine has not been accepted by this defendant, nor operated or attempted to be operated by defendant, his agents, employees, nor any person acting by or under his authority, and did not pass out of the control of the plaintiff, nor has the said machine been used by him in his said brewery, because said machine was worthless and incapable of serving any useful purpose therein.

III. That defendant denies that any sum of money has become due or payable to this plaintiff by virtue of the agreement hereinbefore mentioned, and defendant also denies that the conditions of said agreement have been so fulfilled by the plaintiff as to require the giving of the notes by this defendant, as in said agreement and complaint mentioned, and denies that plaintiff has any
61 remedy at law for the recovery of the alleged balance of four thousand seven hundred and twenty-five dollars, but that plaintiff's remedy, if any, lies in a suit in equity for specific performance of such part of said agreement as relates to the giving of notes for equal instalments of said alleged balance.

IV. That defendant has not sufficient knowledge to form a belief as to the truth of the allegations in said complaint contained at folios numbered 11, to wit, that plaintiss is a corporation duly incorporated under the laws of the State of Virginia, and has its principal place of business in the State of Virginia, and is a citizen and resident of and located within said State of Virginia, and therefore denies the same.

And for a further and second defense defendant alleges, upon information and belief:

I. That neither at the date of the said agreement nor subsequent to said date has the plaintiff had any lawful right to make, use, or sell to others to be used the refrigerating machine named and referred to in the agreement aforesaid, and could not vest in the defendant any lawful right to use the said machine, inasmuch as the said machine embraced and included inventions and combinations of parts patented to parties other than the said plaintiff, and in which plaintiff had not at that time nor has since had any right, title, or interest whatsoever, all of which was fraudulently concealed from this defendant by said plaintiff, although the same was
62 well known to said plaintiff at the time said agreement was made.

II. That the object of said agreement on the part of said plaintiff was to enable said plaintiff to derive profit from the putting in use and operation contrary to law inventions and combinations covered and embraced by letters patent of the United States owned by and belonging to parties and persons other than said plaintiff

and in which plaintiff had and has no right, title, and interest whatsoever, and to infringe upon letters patent and to cause defendant to join in such unlawful use or operation and infringement. Wherefore defendant alleges and avers that said agreement was contrary to public policy, unlawful, and void *ab initio*.

III. And defendant further alleges that had he accepted and put in operation the refrigerating machine referred to in said agreement he would have been liable to prosecution and to heavy charges and damages because of infringement upon letters patent of the United States as aforesaid; all of which, although well known to said plaintiff, was fraudulently concealed from this defendant by said plaintiff.

And the said defendant, answering by way of counter-claim, says—

That he, the said defendant, deceived by the false, fraudulent representation to him made by or on behalf of said plaintiff, permitted said plaintiff to erect a certain machine in the brewery of said defendant, at numbers 258–264 Maujer street, in Brooklyn, E. D.,
63 New York, and relying upon the false and fraudulent representations to him, the said defendant, made by or on behalf of said plaintiff, and which were known to said plaintiff to be false, he, the said defendant, did permit an agent of said plaintiff to subject his said brewery to the action of said machine, and that by the operation and action of said machine while under the supervision and control of an agent of said plaintiff a large quantity of beer in the process of manufacture in said brewery was spoiled, and thereby caused to this defendant a loss which, together with the loss of customers directly traceable to the spoiling of said beer as aforesaid, amount*ing* to the just and full sum of ten thousand (10,000) dollars.

Wherefore defendant demands judgment in his favor and against this plaintiff dismissing the complaint herein and for the sum of ten thousand ($10,000) dollars, besides the costs and disbursements of this action.

JAMES A. WHITNEY,
Attorney for Defendant.

140 Nassau St., N. Y. city.

UNITED STATES OF AMERICA,
City of Brooklyn, Kings County and State of New York, } ss.:

Michael Seitz, being duly sworn, says that he is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he verily be-
64 lieves it to be true.

MICHAEL SEITZ.

Sworn to before me this 1st day of August, 1882.
[L. S.]
ALFRED R. PAGE,
Notary Public, Kings County.

65 In the Circuit Court of the United States for the Eastern District of New York.

THE BREWERS' REFRIGERATING MACHINE COMPANY
against
MICHAEL SEITZ.

The plaintiff, for its reply to the defendant's answer to the plaintiff's complaint herein, shows:

First. As to so much of said answer as sets up any matter in avoidance of the cause of action set forth in the complaint the plaintiff, on information and belief, denies each and every allegation thereon in that behalf in said answer alleged.

Second. As to so much of said answer as sets up any recoupment, offset, or counter-claim, plaintiff denies, upon information and belief, each and every allegation in that behalf in said answer alleged.

And plaintiff demands judgment as in said complaint prayed for.

JOHN H. V. ARNOLD,
Attorney for Plaintiff.

No. 206 Broadway, New York city.

66 EASTERN DISTRICT OF NEW YORK, } ss:
State of New York, County of Kings, }

John H. V. Arnold, being duly sworn, says that he is the attorney for the plaintiff in the foregoing reply named; that he has read said reply; that said reply is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the grounds of deponent's information and belief are communications made to him by the plaintiff and its officers, and that the reason why deponent makes this verification is that none of plaintiff's officers are now within the State of New York or within the city and county of New York, wherein deponent resides, nor within the county of Kings, wherein deponent makes this verification.

J. H. V. ARNOLD.

Sworn to before me this 21st day of August, 1882.
RICHARD P. MORLE,
Notary Public, Kings Co., N. Y.

And inasmuch as none of the said exceptions so offered and made to the said decisions and rulings of the said judge do appear upon the record of the said trial, therefore on the prayer of the said defendant, by his counsel, the said judge hath to this bill of exceptions put his hand and seal, according to the statute in such case made and provided, this twenty-first day of April, 1888.

W. J. WALLACE. [SEAL.]

Endorsed: Bill of exceptions. Filed April 23, 1888.

67 Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

THE BREWERS' REFRIGERATING MACHINE COMPANY, Plaintiff,
vs.
MICHAEL SEITZ, Defendant.
} Bond for Damages and Costs.

Know all men by these presents that we, Michael Seitz, of Brooklyn, New York, as principal, and John N. H. Huiver, of the said city, and Peter Doelger, of the city, county, and State of New York, are held and firmly bound unto the above-named plaintiff, The Brewers' Refrigerating Machine Company, in the sum of thirty thousand dollars, to be paid to the said The Brewers' Refrigerating Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 10th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas the above-named Michael Seitz has prosecuted his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the
68 circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Michael Seitz shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MICHAEL SEITZ. [L. S.]
JOHN N. H. HUIVER. [L. S.]
PETER DOELGER. [L. S.]

Sealed and delivered and taken and acknowledged this 10th day of May, 1888.

[L. S.]

ANTHONY GREF,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

UNITED STATES OF AMERICA,
Eastern District of New York, } ss:

John N. H. Huiver, being duly sworn, deposes and says that he is a freeholder in the city of Brooklyn, Long Island, and that he is worth the sum of sixty thousand dollars over and above all his just debts and liabilities.

JOHN N. H. HUIVER.

Sworn to this 10th day of May, A. D. 1888, before me—

ANTHONY GREF,
Notary Public, Kings County.

Cert. filed in N. Y. Co.

UNITED STATES OF AMERICA, } ss:
Eastern District of New York, }

69 Peter Doelger, being duly sworn, deposes and says that he is a freeholder in the city of New York, and that he is worth the sum of sixty thousand dollars over and above all his just debts and liabilities.

PETER DOELGER.

Sworn to this 14th day of May, 1888, before me—
ANTHONY GREF,
Notary Public, Kings County.

Certificate filed in N. Y. county.

Endorsed: Bond for costs on appeal. Filed May 15, 1888.

70 UNITED STATES OF AMERICA, } ss:
Eastern District of New York, }

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the feregoing pages, numbered from one to sixty-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in ths case of The Brewers' Refrigerating Machine Company *vs.* Michael Seitz, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this first day of June, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

The Seal of the Circuit Court, Eastern District of New York.

B. LINCOLN BENEDICT, *Clerk.*

71 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Michael Seitz, plaintiff in error, and The Brewers' Refrigerating Machine Company, defendant in error, a manifest error hath happened, to the great damage of the said Michael Seitz, plaintiff in error, as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the

same, to the justices of the Supreme Court of the United States, at the capital, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Samuel F. Miller, senior associ-te justice of the Supreme Court of the United States, this 14th day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

The Seal of the Circuit Court, Eastern District of New York.

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

The foregoing writ of error is hereby allowed.

CHAS. L. BENEDICT.

72 UNITED STATES OF AMERICA, *Eastern District of New York,* } *ss:*

I, —— ——, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from — to —, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of —— ——, plaintiff in error, against —— ——, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the eastern district of New York, in the second circuit, this — day of ——, in the year of our Lord one thousand eight hundred and eighty-—, and of the Independence of the United States the one hundred and —.

—— ——.

[Endorsed:] 5144. U. S. circuit court, eastern district of New York. Michael Seitz, plaintiff in error and defendant, ag'st The Brewers' Refrigerating Machine Company, defendant in error and plaintiff. Writ of error. Due service of a copy of the within writ of error is hereby admitted. Dated N. Y., May 14th, '88. J. H. V. Arnold, sol'r for compl't.

73 UNITED STATES OF AMERICA, *ss:*

To the Brewers' Refrigerating Machine Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-eight,

pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein Michael Seitz is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated May 14th, 1888.

CHAS. L. BENEDICT.

74 [Endorsed:] 5144. U. S. Supreme Court. Michael Seitz, plaintiff in error, against The Brewers' Refrigerating Machine Company, defendant in error. Citation. Due service of a copy of the within citation is hereby admitted. Dated N. Y., May 14th, 1888. J. H. V. Arnold, sol'r for compl't.

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Supreme Court of the United States.

MICHAEL SEITZ,

Plaintiff in Error,

against

THE BREWERS' REFRIGERATING MACHINE COMPANY,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ESEK COWEN,
Counsel for Plaintiff in Error.

COWEN, DICKERSON, NICOLL & BROWN,
Attorneys.

Evening Post Job Printing House, New York.

Supreme Court of the United States.

MICHAEL SEITZ,
Plaintiff in Error,

AGAINST

THE BREWERS' REFRIGERATING MACHINE COMPANY,
Defendant in Error.

This is a writ of error directed to the Circuit Court of the Southern District of New York, for the purpose of reviewing a judgment rendered in that Court for the sum of $13,087 damages, for an alleged breach of contract.

The action was brought by the Brewers' Refrigerating Machine Company against Michael Seitz, upon a contract made by the defendant in error to furnish said Seitz with a refrigerating machine, for which the said Seitz promised to pay the sum for which the judgment was rendered.

Statement of Facts.

On the 11th day of January, A. D. 1879, the parties to this action entered into a written contract, which will be found upon page 2 of the printed record, forming a part of the complaint.

By this contract, the Brewers' Refrigerating Machine Company, defendant in error, agreed to supply the plaintiff in error with a number 2 size refrigerating machine, as constructed by the said party of the first part, by the 15th day of March then next, or as soon thereafter as possible. The machine was to be delivered at the depot or wharf in Philadelphia, Penn., and to be put up and put in operation by the said party of the second part at his brewery in Brooklyn, N. Y., under the superintendence of the defendant in error. For this machine the plaintiff in error agreed to pay the sum of $9,450 in installments. The machine was put in the brewery, not on the 15th of March, but some time in May, 1879, and was completed in August, 1879 (fol. 25).

There was a conversation between the parties, before the contract was made, in which the agent for the Refrigerating Company promised that they would cool the brewery of the plaintiff in error, comprising about 150,000 cubic feet, to 40 degrees Fahrenheit, or 2½ degrees Reaumur. They agreed to put a machine there that would cool the whole building better than the proprietor of the brewery could do it with ice. They said they would furnish a temperature of from 2 to 2½ degrees Reaumur; that they would keep up that temperature—maintain that temperature of 2½ degrees. They measured the rooms and were shown all the rooms that were necessary to be cooled and agreed that they knew all about it (fols. 36 and 41).

The plaintiff in error purchased the machine, relying upon and induced by these representations (fol. 36). On the 13th day of January, 1879, two days after this contract was executed, Mr. Stoll, the agent or superintendent of Mr. Seitz, wrote to the Refrigerating Company, stating that the agreement was not satisfactory to Mr. Seitz; that it ought to have contained a written guaranty that the com-

pany would cool his building to at least 3½ degrees Reaumur, and keep it at that, as otherwise he would have no use for the machine (fol. 44). To this the defendant in error replied, on the 20th of January, 1879, declining to give the guaranty, and also saying: "We are confident, from the experience with the Portner machine during the summer and fall, that the machine sold to Mr. Seitz will not only give him *the desired low temperature*, but will in addition give him what he never before had in the warmer months, namely, pure and dry air" (fol. 45).

There is no denial, by the defendant in error, that its agent who conducted the negotiation did make the promises, and representations, that were testified to by Mr. Seitz and Mr. Stoll. The machine, as I have before stated, was put up in the brewery and completed in August, 1879. The testimony is clear, and entirely uncontradicted, that the machine would not produce the effect desired by Seitz and promised by the company.

Mr. Seitz testifies that, having plenty of ice in the the upper rooms of his brewery at the time the machine was first put in operation, he tried at first cooling the lower rooms only of the brewery, and that it was impossible to get them to a temperature sufficiently low for brewery purposes. He had some ice down in these lower rooms, and the machine let the ice melt away, and it got warmer instead of cooler. They admitted that it didn't do the work and said that the chute that conveyed the cold air into the building was too small. They put in a larger chute and still it would not work. It was faithfully tried from three to four weeks, and entirely failed to cool the brewery sufficiently to make good beer. A large quantity of beer was soured and spoiled by the want of a sufficiently low temperature. As soon as the ice went out the temperature, in the cellars, went up to 48 degrees—

entirely too high a temperature for the successful operation of the brewery, and the cellar began to get musty and smell, while the rooms, in which the machine had been working, were only about half the capacity which the company had promised to cool (see the testimony of Mr. Seitz and Mr. Stoll, fols. 36–38, and 42–43).

After this trial, the plaintiff in error wrote to the Refrigerating Company the letter which will be found at folio 27 of the record, dated September 26, 1879. In this letter he notifies them that, on account of the high temperature in his works, he has been obliged to stop their machine and return to ice, and notifies them that he cannot run the machine any longer; that is, that he cannot accept it as a fulfillment of their contract, unless they can furnish, as they promised at the start, 40 degrees for 150,000 cubic feet. The plaintiff in error, after this notice, stopped using the machine, never has used it since, treated it as an entirely worthless machine; but being a machine of enormous weight, weighing ten tons and more, and having a steam engine connected with it, he could not very well return it to the defendant in error, and he relies upon his notice of non-acceptance as a sufficient rescission of the contract.

The complaint in this action sets up the contract of purchase and sale, the delivery of the machine, and the breach of the promise to pay the purchase price. The answer of the plaintiff in error, while not skillfully drawn, did originally set up a substantial breach of contract on the part of the Refrigerating Company. It declares that "the machine placed in "defendant's brewery was worthless, and incapable of "operating to produce the results, represented by "plaintiff to this defendant, as an inducement to "enter into the aforesaid agreement; that said ma-"chine has not been accepted by this defendant, nor "operated or attempted to be operated by defendant,

" his agents, employees, nor any other person, acting " by or under his authority, nor has the said machine " been used by him in his said brewery, because said " machine was worthless and incapable of serving " any useful purpose therein." He also sets up a counterclaim for damages by reason of fraudulent and false representations as to what the machine would accomplish. Though there was a general attempt in this answer to set up a breach of contract, the allegations were not at all definite or certain, but the defendant in error having replied and gone to trial, it was precluded from raising that question.

But in addition to this, the answer was amended, on the trial, by stating what the representations were. It is true that the counsel for the plaintiff in error, seems to have been under the impression that the allegations, in the amended answer, made out a case of false representations or fraud. There was in fact, no element of fraud in these allegations, but they did make out, if true, a plain breach of contract upon the part of the defendant in error, as the Court will see by examining the amendment on page 15 of the record.

There are definite allegations that the plaintiff below represented that the machine to be furnished should be capable of cooling certain rooms in the brewery of the defendant, which rooms were well known to the agents of the complainant, and had been examined by them, and that the defendant below contracted to purchase said machine upon the guaranty, by the complainant, that said machine would cool, and would be capable of cooling certain rooms, in the premises or brewery of the defendant, to the degree required, in the manufacture and production of beer. Also that the defendant below entered into the contract upon the promise of the plaintiff that the No. 2 machine, referred to in the contract, would cool and would be capable of cooling a space of 150,000 cubic feet of

air, to a temperature, sufficiently low, for the purpose of brewing or manufacturing beer; that is to say, to a temperature of 40 degrees Fahrenheit.

These were definite, and certain allegations as to the promises and guaranty of the defendant in error at the time the contract was entered into, and of its breach.

After fully sustaining the allegations in the answer, by the evidence of Messrs. Seitz and Stoll, the defendant rested, and the plaintiff moved that the Court direct a verdict in favor of the plaintiff for $13,078, and that motion was granted in the language which will be found at folio 51.

It is quite clear that the learned Judge, in directing this verdict, entirely misconceived the effect of the evidence which had been introduced. That the counsel, for the defendant below, did not call his attention to the rule of law applicable to the facts, is extremely probable, but as this is a bill of exceptions, and as it could not properly contain the arguments used upon the trial, that is a mere matter of inference. The Court was laboring under two misconceptions. In the first place, it said that the only defense which was worth considering, was that of fraudulent representations, and that there was no evidence of fraud in the case. It was perfectly true that there was no evidence of fraud in the case, but is was not true that the defense, which was alleged in the answer, and proved by the evidence, was a defense of fraud. On the contrary, it alleged, purely and solely, a breach of contract.

The Judge then declared that there was a written contract in the case, and *and inasmuch as that contained no warranty*, the purchaser had no defense, although the vendor did not fulfill the verbal agreement made at the time the contract was entered into. "Therefore," said the learned Court (and I presume that the direction, though, doubtless, in accordance with his judgment, was much against his

inclination), "however unfortunate it may be for "the defendant, the plaintiffs are entitled to a verdict."

I hope to prove that the Judge was in error in this ruling, as also in his subsequent remark that the purchaser could not establish a defense, upon proof that the machine was not a "satisfactory" article, if we interpret "satisfactory" to mean reasonably fit for the purpose for which it was sold.

The jury rendered a verdict, in accordance with the direction of the Court, upon which judgment was entered, and the defendant brought error to this Court.

Assignment of Errors.

The only exception that I care to examine upon this appeal, is that to the direction of the Court, ordering a verdict in favor of the plaintiff below. That exception was well taken for the following seasons:

POINTS FOR DEFENDANT IN ERROR.

I.

The defense, set up in the amended answer, contained no element of fraud, but was a sufficiently well expressed pleading, setting up a contract of warranty, or guaranty, *collateral to the contract of purchase and sale.*

It is quite true that the counsel for the defendant in setting up the representations of the plaintiff, used the words "false and fraudulent," but there was nothing in the nature of fraud, in the actual facts stated, and the facts could not be converted into a defense, founded upon fraud, by what Mrs. Mala-

prop would call "a nice derangement of epitaphs." It is also true that there is an allegation in the answer that the plaintiffs knew that the representations were untrue, but that is mere superfluity. It is difficult to see how fraud can be predicated, upon representations as to a machine which is not in existence, but which is to be constructed in the future. Therefore, the allegations of the defense were not allegations of fraud, or of false representations, within the meaning of the rule that fraud avoids a contract, and the Circuit Judge should have known it. The answer simply contained allegations, setting up a parol contract of guaranty or waranty, that the machine to be purchased should have a certain capacity, and should be capable of doing certain work. The epithets employed by the counsel for the defendants were not sufficient to change the essential nature of the defense. Indeed, the old common law pleadings, setting up a breach of warranty, always contained the allegation that the representations were "false and fraudulent," and the form of the action was for deceit, so that the counsel for the plaintiff in error cannot justly be charged even with bad pleading, and after all, it is the facts set up in the pleading, which establish its nature, and not the adjectives applied to the facts.

II.

The learned Judge was entirely mistaken, in his supposition that the written contract precluded the proof of a parol guaranty, collateral to the main contract of purchase and sale, and not in any way contradicting or modifying it.

The contract of purchase and sale was simply a contract to sell and deliver on one part, and to pur-

chase on the other part, a machine of the general description, which the plaintiffs were then constructing, and known as size No. 2. The sole effect of the contract was to bind one party to deliver such a machine, and to bind the other party to pay for it. It had no other legal effect whatever, and a contract that the machine *after it was delivered*, should do certain work, and be capable of a certain operation, and should produce a certain effect, in no way contradicted, modified or added to the original contract. It was purely collateral, and as such could be proved by parol. This is the law in England. It is the law of the State of New York, where this cause of action arose, and where this case was brought and tried.

It is only necessary upon this point to quote a few of the cases in which this question has been considered, and more especially, as at least two of the cases cited from the New York Court of Appeals, contain a very elaborate examination of the question.

Batterman *v.* Pierce, 3 Hill, 171.
Johnson *v.* Oppenheim, 55 N. Y., 293.
Chapin *v.* Dobson, 78 N. Y., 74.

The case of *Chapin against Dobson* last cited, was one which, as the Court will see upon examination, is almost exactly the same as the one before the Court. In that case there was an ordinary executory contract of purchase and sale of a machine by a descriptive name, a collateral parol contract, guaranteeing that the machine, when furnished, should be able to do certain work, and a breach of such parol contract, the Court of Appeals unanimously holding that that defense might be proved by parol, and that it constituted a perfect defense to the action.

In the later case of *Eighmy against Taylor* (98 N. Y., 288), the Court of Appeals, in another unanimous

decision, re-examined the question decided in *Chapin against Dobson*, and come to the conclusion that the rule does not apply to an *executed* contract of sale, but that it does apply to *executory* contracts of that nature.

Therefore, when defendant below had proved the collateral promise, representations, guaranty or warranty of the plaintiff, and had proved a breach of that parol contract, there was certainly enough in the case to send it to the jury and the direction of a verdict for the plaintiff was plainly error.

III.

Aside from the express parol warranty or guaranty, there was clearly an implied warranty, arising from the very nature of the transaction, that this machine should be *reasonably fit to accomplish the purpose for which it was sold.*

1. There is no doubt of the general rule, that when a manufacturer enters into an *executory* contract to manufacture and furnish a certain article to a purchaser, and fully knows the purpose for which the article is intended, that there arises an implied warranty that the article shall be reasonably fit for the purpose for which the buyer intends to use it, and that it shall, to a reasonable degree at least, accomplish the purpose for which it was bought. There is some difference apparently, in the decisions of the courts, with regard to the question of how far this principle applies to an *executed* sale, but that it applies to an *executory* sale, where the manufacturer is to make and deliver the article at a future time, there can be no possible doubt. It is the rule in

England, and so far as I know in all the States, and beyond all question it is the rule in the State of New York.

Benjamin on Sales, § 988, and note.
Brown against Edgington, 2 Manning & Granger, 279.
Jones *vs.* Bright, 5 Bing., 533.
Van Wyck *vs.* Allen, 69 N. Y., 61.
Gautier *v.* Douglas Mfg. Co., 13 Hun, 514.
Hoe *v.* Sanborn, 21 N. Y., 552.
Wood Mowing and Reaping Co. *vs.* Thayer, 50 Hun, 516.
Gaylord Mfg. Co. *vs.* Allen, 53 N. Y., 515.

2. The evidence in this case, even if we assume that it was inadmissible, to add to, or vary the written contract of sale, was certainly admissible, for the purpose of showing the relation between the parties. It showed, if nothing more, that the plaintiff, below, by his agents, had examined the brewery of the defendant below, had measured it, and had ascertained the amount of space which it was necessary to cool. It shows that the plaintiff knew that the defendant had been cooling his brewery with ice, and that the object of paying nearly $10,000 for a machine of this character, was to obviate, and render unnecessary the expense of purchasing ice, for the purpose of cooling his brewery. Unless the machine would take the place of ice, and cool his brewery to the same, or about the same extent that the ice did, it was utterly worthless, and of no use to him whatever.

There was then, arising from the circumstances of the case, if not from express contract, an implied agreement of warranty, on its part, that the machine should take the place of the ice which had been formerly used in the brewery, and should cool

it to the same extent. Because, if it was not cooled to the same extent, the beer would be spoiled, and the defendant would be unable to do business, and if he was obliged to buy ice to cool it, the whole object of purchasing the refrigerating machine would be defeated. That all these facts were known to the plaintiff, below, and its agents, that they did furnish the machine for that particular purpose, that the machine was useless; and not fit for its purpose either "reasonably" or otherwise, is clearly shown by the evidence. That it would not produce as good an effect as the ice, which was formerly used, there can be no possible dispute. The contract then, being executory, and raising an implied warranty that the machine should be reasonably fit to accomplish the purpose, for which the plaintiff knew it was bought, the fact that it did not keep the temperature of *one-half of the rooms* in the building low enough to successfully manufacture beer was a plain breach of that implied warranty, and entitled the defendant, at least, to go to the jury upon the facts proved.

3. The letter of September 20, upon page 12 of the record, was a sufficient notice to the plaintiff below of non-acceptance of the machine by the defendant. After a faithful trial of from three to four weeks, in which he had failed to cool one-half of his building, and had spoiled his beer, the defendant below wrote to the plaintiff that he was obliged to stop the machine, as he could not get his cellars cool enough for his purpose. He declares that he is about to introduce ice into his brewery for the purpose of cooling, and that he *could not run the machine any longer* unless the plaintiff would comply with the terms of its warranty. This was a sufficient notice that he did not intend to accept the machine or to pay the purchase money. He was not bound, upon any principle of law, to take this machine back to Alexan-

dria, Va., where the plaintiff's manufactory was located.

Mr. Eils, one of the agents of the plaintiff, testifies as follows: "It is a very large machine; a powerful "machine; at least ten tons in weight, I should think. "I have not weighed it. It is a large machine com- "posed of two pumps that were ten inches in diam- "eter, I believe, and had about twelve-inch stroke, "and they were built to compress ammonia to a "pressure of from 125 to 150, 175, or even 200 "pounds per square inch. In addition to that, it "had a steam engine attached to these pumps for "driving them. In addition to that, it had a very "large condenser that contained perhaps ten or fif- "teen hundred feet of pipe, three-quarters of an inch "gas pipe," and that it "covered," that is occupied, exclusively, two rooms.

To say that, in order to avail himself of his legal defense, the defendant below was obliged to uproot this machine and send it back to Alexandria, would be laying upon him a burden, which the law has never yet imposed upon a purchaser.

IV.

The defendant also alleged and proved the counterclaim based upon facts which certainly should have been sufficient to prevent a direction of a verdict for the plaintiff.

He proved, at folio 38, that by reason of the failure of this machine to cool the brewery properly, he lost a large amount of beer—about three hundred barrels —and although the exact value of the beer was not stated in the testimony, a jury would know that three hundred barrels of beer were worth something, and would award at least some substantial damages, and this alone should have been sufficient

to prevent the direction of a verdict. The measure of damages was probably the difference between the value of the machine as it was and its value as warranted, and the evidence was that *as it was*, it was *worthless*.

V.

It may be said that the answer does not specifically, and definitely, allege an implied warranty, or a breach thereof.

It is true that it only, impliedly, alleges that the machine was bought for a particular purpose, and that it proved substantially unfit for such purpose. The allegation is that it was worthless and incapable of performing the work which it was represented that it would do, and the fair inference from that statement is that the defendant below purchased the machine for the purpose of doing the work mentioned in these representations.

But be that as it may, the condition of the answer is no reason for denying the defendant the benefit of his defense under the New York Code of Procedure. The evidence was received without objection that it was inadmissible under the pleadings, the only objection to it being that it was not competent to vary or modify the written contract of sale. That objection was overruled and the evidence received, and after receiving it, and thereby depriving the defendant of the exception which he might have taken if it had been excluded, the Court had no right to disregard it.

Under the New York Code, where the case has been fully tried and material evidence received without objection by either party, it matters very little what the allegations in the pleadings are. The case then depends npon the proof. The answer, if neces-

sary, might and should have been amended upon the trial to conform it to the facts proved.

By Section 723 of the Code, the Court is authorized upon the trial to amend the pleadings by inserting any allegation material to the cause of action or defense, or where the amendment does not change substantially the claim or defense by conforming the pleading to the facts proved. And the section further provides as follows: "And *in every stage of the ac-* "*tion* the Court must *disregard* an error or defect " in the pleadings, or other proceedings, which does " not affect the substantial rights of the adverse " party."

In the case of *Wood against Wood* (26 Barb., 359), the Supreme Court of the State of New York, in commenting upon this section, said: "Errors in "pleadings must now be fatal to the action or defense, " or they will be disregarded, or cured by amend- " ments, in furtherance of justice, both before and " after judgment. A plaintiff who expects to re- " cover in [illegible]ction, when there is a substantial " defense to it, solely by reason of defects in the " answer, or a defendant, who thinks of succeeding " in an action, upon errors in the complaint, with- " out regard to the merits of his defense, may as " well stay out of court, as to come in under the " Code."

See also

Catlin *v.* Gunter, 11 N. Y., 368.
Hall *v.* Gould, 13 N. Y., 127.
Zabriskie *v.* Smith, *Id.*, 330.

VI.

The exception taken by the defendant, below, to the direction of a verdict, was sufficient to raise the questions I have discussed, and it was not neces-

sary for the defendant's counsel to ask the Court for leave to go to the jury, upon any of the questions in the case.

It has been held, in some cases, in the State of New York that where there are disputed questions of fact in the case, and when *each party* asks for a direction of the Court, in his own favor, that by so doing, they substantially admit that there is no question of fact in the case, or if there is, that they submit such questions to the Judge, and the defeated party cannot, after a direction against him, raise the point that the case should have gone to the jury. But in a case like this, where the Court against the opposition of one of the parties, directs a verdict *upon all the facts in the case*, thereby substantially *deciding* that there is *no evidence* which requires the submission of the case to the jury, an exception to the direction is all that is required.

Stone *v.* Flower, 47 N. Y., 566.
Train *v.* Holland Purchase Co., 62 N. Y., 598.

The judgment of the Circuit Court should be reversed and a new trial ordered, at which the rights of the respective parties can be properly proved and presented to the Court.

ESEK COWEN,
Of Counsel for Plaintiff in Error.

COWEN, DICKERSON, NICOLL & BROWN,
Attorneys.

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MICHAEL SEITZ,

Plaintiff in Error,

against

THE BREWERS' REFRIGERATING MACHINE COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN H. V. ARNOLD,
Attorney and Counsel for Defendant in Error.

EVENING POST JOB PRINTING HOUSE, N. Y.

Supreme Court of the United States.

MICHAEL SEITZ,
Plaintiff in Error,

AGAINST

THE BREWERS' REFRIGERATING MACHINE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

Statement of Facts.

This action was brought to recover the sum of nine thousand four hundred and fifty dollars, the purchase price of a refrigerating machine sold and delivered and put up, and put in operation in the brewery of the plaintiff in error, in the City of Brooklyn, New York, pursuant to a contract therefor in writing, entered into between the parties to this action on the eleventh day of January, 1879. At the close of the defendant's case a verdict in favor of the plaintiff for the full amount of the contract price for said machine, together with the interest thereon, was directed to be found by the jury by the

trial Judge, Hon. William J. Wallace. An exception was taken by the plaintiff in error to such direction of the Judge, and this case is now brought to this Court by writ of error for the purpose of having a review of such direction.

At the close of the plaintiff's case the defendant did not claim that the plaintiff had not made out a *prima facie* case entitling him to recover, but went on and attempted to establish his affirmative defense of verbal warranty, breach of it, and false representations made in order to induce him to enter into the contract.

Record, P. P., 16.

All of the evidence offered by the plaintiff in error in support of these defenses was received (against the objection of this defendant),

Record, P. P., 19,

except the evidence of an alleged expert, who had never seen the machine in question, that some other machine purporting to have been made by this defendant in error did not refrigerate or did not produce cooling effects, or was not capable of cooling a given quantity of air.

Record, P. P., 24.

This defendant in error was a manufacturer of certain kinds of machines, among others those which they called refrigerating machines, and built and used for the purpose of reducing to a lower temperature the atmosphere in stores, storehouses, breweries and such places. The plaintiff in error was a brewer in the City of Brooklyn, and desired to obtain a refrigerating machine for the purpose of cooling off the cellars and storerooms in his brewery by means of it, instead of with ice stored therein as he had been in the habit of doing theretofore.

Pursuant to a telegram from Seitz's agent Stoll,

defendant's secretary, Mr. Eils, and superintendent, Mr. Cook, came to Brooklyn, and with Mr. Seitz and Mr. Stoll went through the brewery and examined it. Thereafter the written contract of January 11th, and upon which this action is brought, was entered into between them, in which this company agreed to furnish and put up in good working order a refrigerating machine for the sum of nine thousand four hundred and fifty dollars, which sum was to be paid by Mr. Seitz, one-half in cash when the machine was set up and put in operation, and the remaining half in his notes payable in one, two and three months thereafter. This contract does not provide that the machine which is to be purchased shall be able to accomplish the results desired to be obtained by Mr. Seitz. It simply provides that it shall be a good machine, properly constructed, properly set up, and shall be No. 2 in size. Mr. Seitz now claims, as a defense to this action, which is brought to recover the purchase price of that machine, that at or before the time of his entering into this contract, this company, by its secretary, Mr. Eils, verbally guaranteed that this machine, when set up and put in operation, would produce certain results; namely, would cool off his brewery to a temperature of 40 degrees Fahrenheit or 3½ degrees Reaumer, and he says that because of the making of this guarantee by Mr. Eils he bought this mahine, and that he would not have bought it without such a guarantee being made.

It is important to note here that the whole ground of his defense is based upon the claim that this alleged verbal guarantee was made before the written contract of January 11th, and that he would not have made that contract but for such verbal guarantee. He nowhere claims that this guarantee as to what the machine would accomplish was made after he entered into the written contract of January 11th, and all of his evidence shows that

all efforts on his part to induce the company to make such a guarantee after the making of the written contract were met by a prompt and decisive refusal on their part so to do. It is not claimed that the written contract is in itself in any way, by any of its terms, ambiguous, deficient, uncertain or lacking in any of the elements necessary to constitute a full and complete legal contract between the parties, nor is it claimed that the plaintiff in error entered into it through any accident, mistake or oversight, and for that reason none of these questions arise in this case.

POINTS.

Point First.

The alleged agreement to cool this plaintiff's brewery to a certain temperature with the machine which was the subject matter of the contract upon which this suit was brought does not, for several reasons, constitute any fraud upon this plaintiff in error, which now entitles him to rescind it. In the first place, assuming it to have been made (which is very doubtful in view of this plaintiff's own letters and telegrams which are in evidence), it did not purport to be a representation of any existing fact. A statement, in order to amount in law to a representation, must be made in regard to some existing fact, not in regard to something that will or may happen in the future. No statement was made concerning this machine of any fact then existing, and could not have been made for the reason that the machine itself was not then built, but was to be built and was thereafter built and set up in this plaintiff's brewery. A statement as to what that

machine would do, or what results it would produce in the future was simply a matter of opinion and of guarantee, and was not a representation of any fact then existing, or purporting to be existing at that time.

Sawyer *v.* Pickett, 19 Wallace, 146.
Gordon *v.* Butler, 105 U. S., 553.

There is nothing in this case to take it without the principles of the cases above cited. The question as to whether or not this machine when completed would be sufficient to cool the plaintiff's brewery was not one which the defendant's agents could determine with any degree of certainty from their own particular knowledge or from any measurements or calculations which they could make, for the reasons given in Mr. Eils' letter (Record, pp. 13 and 21), and the question as to whether or not the brewery could be cooled by this machine did not necessarily depend upon the machine itself, but upon the manner in which it was used and its surroundings. As to whether or not it would be able to do so, if properly handled, was a matter concerning which this plaintiff and Stoll, his agent, could form an opinion from the observations which they made of other machines of this kind similarly used, as well as this defendant's agents. Both Seitz and Stoll visited other breweries for the purpose of seeing how they were cooled where plaintiff's machines were in use, and as experienced persons in the brewing business and informed as to the working of refrigerating machines, they could not claim that they were imposed upon or defrauded by any opinions expressed by defendant's agents as to entitle plaintiff in error to rescind this contract, which he made with a full knowledge of what the machine and the process adopted by the defendant in error was. It is not claimed that any statement testified to have been made by defendant's agents (even if it amounted to a representation) was

known by such agents or by the defendant in error to be false and untrue at the time it was made. Indeed, the whole evidence tends to show that if such agents made any such statement they believed that it was true, and had good reason for believing that it was true, from the fact that they had cooled other large breweries with machines similar to this, as they wrote to this plaintiff when they refused to give him the written guarantee which he requested. At most, it was simply their opinion based on their past experience as to what they thought could be done with this machine when it was built and put in operation, and with favorable surroundings, and for aught that appears in this case it was an honest belief and opinion of theirs, and not one which they knew to be false at the time they were giving it; and anything then said was qualified by what was said in the letter of Eils, dated January 20, 1879, which was received by Stoll, Seitz's agent, and submitted to the former before any work was done on the machine.

Record, P. P. 13 and 21.

The fact that an opinion given turns out to be an erroneous one is no evidence of any intent to perpetrate a fraud.

Lord *v.* Goddard, 13 Howard, 198.
Ostrander *v.* Spiers, 45 N. Y., 175.
Meyer *v.* Amidon, 45 N. Y., 169.

A case very similar to this in principle and in facts has been passed upon by the Circuit Court for the Northern District of North Carolina, in which a party sought to avoid a similar contract upon the same grounds. The contract in that case was to furnish for a sawmill a boiler and certain machinery specified in a written contract, which was complied with, and the defendant refused to comply with his part of said contract and to pay for the same, upon a

claim made by him that he was induced to enter into it by reason of representations made by the other party that such boiler and machinery would be sufficient in power, force and quantity for the purpose for which it was desired, and he also claimed that he was himself ignorant as to whether or not it would so suffice, and unable to form any opinion thereon, but relied upon the representation of the party selling the machine to him that it would.

Judge Dick, in a very carefully considered opinion, in which he cites the decision of this Court made in Bast *v.* Bank, 101 U. S., 93, holds that such a representation, although untrue, does not constitute a fraud which in any way affects the validity of the contract, and as to incorporate it into the written contract would change and vary that contract, parol evidence should not be admitted for that purpose or to defeat or affect that contract in any way.

Chandler *v.* Thompson, 30 Federal Reptr., 38.

Another reason why this alleged additional parol agreement, even if true, is insufficient to destroy the written contract upon the ground of fraud is because such agreement does not relate to the execution of that contract. Fraud, in order to affect or destroy a written contract, must relate to the execution of the contract itself, not in a general way, but in a specific way such as misreading it, or obtaining by some artifice some instrument which the party did not intend to give. Now, it is not claimed in this case that this plaintiff did not intend to make the contract of January 11th, for he claims in the letter which his agent Mr. Stoll wrote to the secretary of this defendant, that he not only intended to make this contract but then desired to get something embodied in it which he did not at first require, and which the defendant in error had not acceded or agreed to.

Record, P. P. 21.

This very subject has been considered by this Court in the case of George *v.* Tate, 102 U. S., 570, in which the decisions of the courts of the State of New York are very freely cited and discussed.

Point Second.

In the next place, this plaintiff is now estopped from claiming that he was induced to make the contract of January 11th because of such alleged statements. Two days after the making of this contract he has Stoll write to Eils that he is not satisfied with it because it contains no written guarantee to the effect that the machine will be sufficient to cool his brewery.

Record, P. P. 21.

He does not then claim that any such representations had been made to him. In that letter he practically says that he did not ask for such a guarantee, and wants it now inserted in the contract or he will not take the machine. This letter is promptly answered by Mr. Eils, who says that such a guarantee could not be reasonably asked for nor honestly given, and is refused for very good reasons, which he particularizes, and this letter is given to Seitz.

Record, P. P. 21 and 23.

Upon the receipt of this letter from Eils, he has Mr. Stoll telegraph to Mr. Eils in effect that it is all right, he will take that risk, and to send on the machine when it is ready.

Record, P. P. 22.

Again, on March 16th, and more than two months after he signed this contract, he has Mr. Stoll write

this defendant to hurry up and commence putting in that machine.

Record, P. P. 22.

Then he allows this defendant at great expense to go on and put up that machine, without any protest, after he has received written notice from it that its agents had never said that it would be sufficient to cool his brewery, and would not say so, and it would not give *any* guarantee.

These acts on the part of this plaintiff in error estop him from now insisting upon the performance of the alleged additional agreement (if ever made).

Ogilvie *v.* Knox. Ins. Co., 22 Howard, 390 and 391.

He was bound as matter of law to repudiate this contract as soon as he received the letter of Eils of January 20th, notifying him that the guarantee asked for would not be given. After notifying defendant upon receiving that letter to go on and complete the machine, and allowing it to be put up in his brewery and placed in operation, he should not be permitted now to repudiate the contract, and insist that another or additional one was made which was not complied with.

Upton *v.* Tribilcock, 91 U. S., 45.

Point Third.

This alleged parol agreement cannot be incorporated into the written contract of January 11th and made a part of it, so as to prevent the enforcement of the contract unless the oral agreement is also complied with. To do so would be to enlarge that contract by parol evidence, and burden it with an

additional warranty, which this defendant refused to give.

The contract upon which this action is founded purports on its face to be a complete one in all respects and to fully express the agreement made between the parties to it, and is not claimed to be ambiguous or indefinite in any way, and this alleged parol agreement cannot, therefore, be incorporated into or made a part of it.

Eighmie *v.* Taylor, 98 N. Y., 288.
Mayer *v.* Dean, 115 N. Y., 560.
Selden *v.* Meyers, 20 Howard, 506.
Willard *v.* Taylor, 8 Wallace, 557.
Swain *v.* Seamens, 9 Wallace, 254.
Forsythe *v.* Kimball, 91 U. S., 291.
Ins. Co. *v.* Mowry, 96 U. S., 544.
Bast *v.* Bank, 101 U. S., 93.

Point Fourth.

The plaintiff in error if he cannot use this alleged parol agreement to base a claim of fraud upon with which to avoid his written contract of January 11th, nor have it made a part of that contract, seeks to use it as an offset against what he admits is due upon his written contract, claiming that it was a collateral agreement made contemporaneous therewith, and that the plaintiff should not be allowed to recover upon his written contract which he holds unless he also performs this alleged verbal agreement, or if that cannot be done, then he insists that, although he endeavored unsuccessfully to get this defendant in error to make a written warranty, he may now claim that there was an implied warranty running with the written contract, which he signed, and therefore not necessary to be incorporated into

it. And to support these contentions he places great reliance upon the case of Chapin *v.* Dobson, 78 N. Y., 74, which he will have this Court believe is almost exactly the same as the case at bar in principle, but which is easily distinguishable from it. He also claims that the case of Gaylord Manufacturing Company *vs.* Allen, 53 N. Y., 515, supports his contentions, but it is submitted that this case also is inapplicable here. The fact that distinguishes this case very clearly from those cited by the plaintiff in error is this, that this alleged parol agreement was not to the effect that this machine when set up would refrigerate, but that it would refrigerate so as to reduce the temperature of the air of this brewery from its normal condition to 40 degrees Fahrenheit or 3½ degrees Reaumer, and *such* an agreement cannot be assumed by implication. The machine was constructed for refrigerating purposes, and there is no claim made but that it did work and operate as a refrigerating machine should, that is, that it did compress ammonia, and that it did reduce the temperature of the surrounding atmosphere to a certain degree of temperature.

The distinction between the cases cited by this plaintiff and the one at bar is clearly pointed out in Addison on Contracts, 8th Edition, marginal paging 977, where he makes use of the following language: "The law implies a promise or undertaking from a "manufacturer that all goods manufactured and "sold by him for a specific purpose, and to be used "in a particular way, are reasonably fit and proper "for the purpose for which he professes to make "them, and for which they are known to be re-"quired. Thus, where a tradesman or manufac-"turer had sold copper sheathings for vessels, it "was held that he implied a warranty and under-"taking that the copper he manufactured was rea-"sonably fit for the purpose of sheathing vessels, "and it would seem indeed that the mere seller of

"copper described as fit for sheathing vessels "would be presumed to have a knowledge of the "article so described and sold, and that the law "would imply a warranty that the article was "reasonably fit for the purpose specified. But when "a known, described and defined article is ordered "of a manufacturer, although it is stated to be re- "quired by the purchaser for a particular purpose, "yet if the known, described and defined thing is "actually supplied, there is no warranty that it "shall answer the particular purpose intended by "the buyer. Thus where a manufacturer invented "and sold 'a smoke-consuming furnace,' and the "defendant ordered it for his brewery, it was held "that the law would imply no warranty that the "machine was fit for the defendant's brewing- "copper, and that the utmost that the vendor could "be considered to undertake under such circum- "stances was, that the machine would con- "sume smoke, which it appeared to have "done in other instances when applied to a "different purpose. 'But,' observes Lord Abinger, "'if the vendor had said, "I will send you one of "my smoke-consuming furnaces, which will suit "your brewery," in such a case that would be a "warranty that it should suit the brewery.' He "also further says: 'In an action for the price of a "printing machine, it appeared that the plaintiff "had obtained a patent for a machine of which he "was the inventor, which he called "'Oliphant's "patent two-colored printing machine," the object "of which was to print calico of two colors; that the "defendant hearing of the invention, wrote to the "plaintiff to know the price; when the latter in "reply, said: "I undertake to make you a two-color "printing machine on my patent principle." Where- "upon the defendant ordered the machine, but could "not make it print two colors, and therefore re- "fused to pay the price. But it was held that, as

"the defendant had got a machine made on the "plaintiff's "patent principle," he had got all he had "bargained for, and that there was no implied "undertaking that it would, in the defendant's "hands and under his management, answer the "purpose for which he wanted it.'"

Oliphant *v.* Bailey, 5 Q. B., 288; 13 L. J., Q. B., 34.

Chanter *v.* Hopkins, 4 M. & W., 399.

These cases clearly show that in this transaction between these parties, there was no implied warranty to the effect that this machine would refrigerate the quantity of air desired to the degree of temperature desired. The only warranty implied was (if any), to the effect that it would perform the work for which it was patented and made, namely, that it would, if properly used, refrigerate the surrounding atmosphere. This was a patented machine, and one of this defendant's witnesses, Mr. Cook, was the patentee.

Record, P. P. 12.

This brings it quite within the principle of the case of the printing machine above referred to.

This distinction in principle between what the law declares to be an implied warranty upon the sale or manufacture of a patented machine, and what this plaintiff in error now seeks to have us believe was implied as a warranty in this case, has been recognized by this Court in the case of the District of Columbia *vs.* Clephane, 110 U. S., 212, which was a case wherein the District of Columbia sought to avoid paying a contractor for furnishing, laying and supplying to the District a certain kind of pavement, called "Miller wood pavement," upon the ground that the pavement had not withstood the use to which it was put for a period of three years. In that case Clephane had expressly agreed that the pave-

ment which he put down should be good pavement of its kind, and well and properly laid, and for any defects either in the laying and construction of it, or in the material of which it was composed, he would be responsible for and replace for a period of three years. There was no evidence to show that the material was defective or improper material of its kind in any way, nor that it was improperly laid or constructed in any way, and yet the District sought to avoid paying for it because it had not withstood the weather and the wear and tear of the use for which it was constructed, to the extent that it had expected that it would, but this Court held that such a defense was unavailable, and upheld the direction of the trial Judge in favor of the defendant, saying: "But we concur with the Court below, "that the defendant did not contract for the per- "fection of his work for three years, nor that he "would keep it good for that time. His contract "was to lay the Miller wood pavement, a patented "invention. Of the capacity of this invention "for resisting weather and use, the Board of "Public Works, and not he, took the responsi- "bility. All his material was submitted to "the inspection of the plaintiff's engineers, and "all his work was done under their eyes, and he "could only receive his pay on their certificate of "work done and inspected. The language of his "agreement is, that if any parts thereof, that is, "the pavement, 'shall become defective from im- "perfect or improper material or construction,' he "will repair. No evidence was offered that any of "the material was imperfect or improper when "placed there, or that any of this construction was "improperly or defectively done. We think this "was necessary to enable plaintiff to recover. It "will not be presumed because the work needed re- "pair within three years, that the material furnished "by plaintiff was originally imperfect, or that the

"construction was not well done. The pavement "may have become defective from improper "and rough usage, from permitting water "to stand on it and produce decay, or, "what is far more likely, from the inherent "inability of the Miller wood pavement to resist the "usual disintegrating forces to which all pavements "are subjected. Against this defendant did not "warrant, and for its consequences he did not agree "to become responsible. In the absence, therefore, "of any evidence that the pavement became defect-"ive within three years from imperfect or improper "material or construction used by defendant, there "was no case against him, and the direction of the "Judge was correct." So that it must be apparent that the defense of this plaintiff in error cannot be sustained upon the claim that there was an implied warranty that this machine would cool 150,000 cubic feet of atmosphere to 40 degrees Fahrenheit, or to any temperature, without reference to the construction of the brewery itself or other surrounding circumstances, nor can it be sustained upon the theory that this alleged parol agreement was collateral agreement or undertaking, for it was not. If anything, it was a direct and special warranty as to the amount of work which this machine could and would do. Lord Abinger, in Chanter *v.* Hopkins, speaking of a similar agreement made in regard to a smoke-consuming furnace, distinctly declares that if the vendor had said, "I will send you one of my smoke-consuming furnaces, which will *suit your brewery*," in such a case that would be a warranty that it would suit the brewery. And, if the learned lord in that case was correct in saying that such an agreement as that was a warranty, then of course it could not be an agreement collateral to the contract of sale, because all warranties, whether expressed or implied, are not collateral to the contract of sale, but are a part of it,

and a parol warranty cannot be made separate from and collateral to a written contract, but must be a part of that contract and incorporated in it, and we have shown that this cannot be done by parol evidence, and that if any such warranty or representation was made to the plaintiff in error in the course of the negotiation, in order to avail himself of it, he should have insisted that it be incorporated into the written contract, which specified what was to be the number and size of the machine, and when it was to be delivered, and where, and the price for which it was to be delivered to him. Otherwise he is deemed in law to have waived and to have treated it simply as a matter of opinion, which he might or might not at his own pleasure consider, in forming his own judgment and opinion as to whether or not one machine of this size was sufficient to accomplish all the work he expected to be done. Therefore we say that this defendant in error did not impliedly undertake as a part of its written contract, that this one machine of this size would be sufficient to cool this whole brewery to any particular temperature, nor did it make any special agreement to that effect, which was collateral to the contract to furnish the machine, and that if any such agreement was made it was not collateral to, but formed a part of that contract and cannot affect it in any way, because, not being in writing, it would change and enlarge that contract which is in writing, and which cannot be varied by any alleged parol agreement.

The case of Chapin *v.* Dobson is not at all in conflict with the defendant's position here.

That case is very much limited in its application by the construction given to it in the case of Eighmie *vs.* Taylor, 98 N. Y., 294, and is an authority upon two questions only. First: that where the contract in suit (as in that case) does not purport upon its face to be a contract complete in all its parts be-

tween the parties, that then parol evidence may be given to establish the other parts. Secondly: that a collateral agreement which does not vary or change the original agreement may be established by parol evidence. There Chapin sold Dobson some feeders, and at the same time agreed with Dobson that if he did not like them after he got them he need not keep them. That of course was an executory contract of sale, dependent entirely upon the whim of Mr. Dobson whether or not he should ever become bound by it to accept the goods and pay for them. Of course, if he accepted of them he must pay for them, but he was not obliged to accept them, no matter how good or how perfect they were, unless he chose to. Of course a proviso to the effect that an agreement to be performed in the future shall not become operative unless a party so desires, is a separate or collateral agreement, but that is not this case. Neither is that case an authority that the alleged parol agreement in this case is a collateral agreement, nor can it possibly be, for the verbal agreement in that case and the verbal agreement in this one are to an entirely different effect. That one, as we have stated, was to the effect that if those feeders did not suit Mr. Dobson he need not keep them. True, it was also said that it was thought they would suit Mr. Dobson, but no guarantee was given to that effect, and none could be, for it was impossible to guarantee that a machine will do, whatever the whim of the other party may choose to want it to do. In this case the alleged agreement was not that this contract should not be considered of effect unless Mr. Seitz was satisfied with the working of the machine, but was to the effect that it would do a certain amount of work.

Now, assume this agreement to have been put in writing and made a part of this contract, and then assume another contract to have been made with

such an agreement as in the Dobson case inserted. In the former case Mr. Seitz would have been bound to accept this machine and pay for it, provided it cooled 150,000 cubic feet of space to a temperature of 40 degrees Fahrenheit, whether he wanted to or not, whereas in the other case, even if this machine did do all this, still he would not be bound to accept of the machine and pay for it unless he chose to. In the one case the agreement is not a warranty, but a simple collateral agreement to the effect that no matter if this machine does come up to our expectations, and does do all that we warrant it to do, yet you are not obliged to accept of it and pay for it unless you choose to. One is an absolute sale with a warranty, and the other is a conditional sale. In the one case title passes immediately upon the execution of the contract and the other not until the performance of the conditions.

Gray *v.* Central R. R., 11 Hun, (18 N. Y. Supreme Ct.), 70.
Moore *v.* Goodwin, 43 Hun, 534.
Wood Reaper Co. *v.* Smith, 50 Mich., 565.
Singerly *v.* Thayer, 158 Penn. St., 291.
McCarren *v.* McNulty, 7 Gray, 139.
Brown *v.* Foster, 113 Mass., 136.
Goodrich *v.* Van Nortwick, 43 Ill., 445.
Hartman *v.* Blackburn, 7 Pitts. L. J., 140.

To give any broader construction to the case of Chapin against Dobson would be to entirely destroy the general rule that written contracts cannot be varied by parol evidence. The Court of Appeals in Eighmie *v.* Taylor, in speaking of that case, says as follows: " This first exception to the general rule is " capable, if too broadly and loosely interpreted, of " working the utter destruction of the rule. For, " if we may go outside of the instrument to prove

"that there was a stipulation not contained in "it, and say that only part of the contract was put "in writing, and then because of that fact enforce "the oral stipulation, there will be little of value "left in the rule itself. The writings which are "protected from the effect of contemporaneous "oral speculations are those containing the "terms of the contract between the parties, and de- "signed to be the repository and evidence of their "final intentions. If upon inspection and study "of the writing, read, it may be, in the light of sur- "rounding circumstances in order to its proper un- "derstanding and interpretation, it appears to con- "tain the engagements of the parties, and to define "the object and measure the extent of such en- "gagement, it constitutes the contract between "them, and is presumed to contain the whole of that "contract." And that rule should be applied to this case.

In the light of all the circumstances under which this contract was entered into, it appears to be upon its face a full and complete contract, and this plaintiff in error does not dispute but that it appears upon its face to be a full and complete contract, but says that there was more of it, and which he now asks to have embodied into it. This defendant says that there was nothing more to the contract between them than just what is expressed in this writing. Hence the necessity for the application of the general rule, that if a written contract appears upon its face to be a complete contract neither party shall be heard to say by parol evidence that it is otherwise. As to whether the contract is a complete one, is to be determined from an inspection, not from the oral testimony of the parties as to what they understood it was to be, nor from the circumstances under which it was made.

Maryland *v.* R. R. Co., 22 Wallace, 105.

Point Fifth.

The answer of the defendant as amended at P. P. 15 of the record alleges a cause of action or counter-claim for fraud and deceit, if it states anything, and the counsel for the plaintiff in error now claims that it also states a cause of action for breach of contract of warranty, and that the words in regard to fraud are mere surplusage. It may be true that a complaint in an action for fraud and deceit may contain all the averments necessary to an action for breach of contract or warranty, and other words in addition and which in such an action might be surplusage, but that will not make it any the less an action for fraud and deceit. This answer was drawn and the case tried on the theory that false and fraudulent representations had induced the plaintiff in error to enter into the contract upon which the action was brought. The proof, however, failed to establish any fraud (although it was alleged) the same as in the case of Lord *v.* Goddard, 13 Howard, 198, in which the complaint was dismissed because a fraudulent intent was not proven, although alleged. Now, the plaintiff claims that such evidence, where it falls short of establishing a case of fraud and deceit, may be turned into one for breach of contract of warranty, and now claims that he should have been allowed to go to the jury upon that theory. The Court of Appeals of this State have decided over and over again than an action or defense cannot be changed from tort to one *ex contractu*, as is now sought to be done in this case.

Salisbury *v.* Howe, 87 N. Y., 128.
DeGrauw *v.* Elmore, 50 N. Y., 1.
Naudecker *v.* Kohlberg, 84 N. Y., 296.
Southwick *v.* Bk. of Memphis, 84 N. Y., 420.

Truesdell *v.* Sailes, 104 N. Y., 267.
Wright *v.* Delafield, 25 N. Y., 266.
Romeyn *v.* Sickles, 108 N. Y., 650.
Clarke *v.* Post, 113 N. Y., 17.

But even if such a radical amendment as that could be allowed, it is still urged by this defendant that the evidence did not establish any counterclaim in favor of this plaintiff for breach of contract. The representations claimed to have been made do not constitute such a contract. Such representations cannot in and of themselves under any circumstances constitute any contract, unless it be a contract of warranty, and therefore there cannot be any counterclaim or action founded upon them standing alone as a separate or collateral agreement, as is sought to be asserted by the plaintiff in this case. They can only constitute a contract when made in connection with some transaction, and in that case they do not become a separate contract by themselves, but a contract of warranty, and forming a part of the whole contract, and for that reason must be in writing, if the whole of the contract is in writing. For that reason there was no counterclaim or defense to the contract in suit established, and the learned trial Judge was right in holding that there was no question to be submitted to the jury.

Bogardus *v.* N. Y. Life Insurance Co.,
101 N. Y., 328.

Point Sixth.

The judgment of the Circuit Court in this action should be affirmed, with costs.

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